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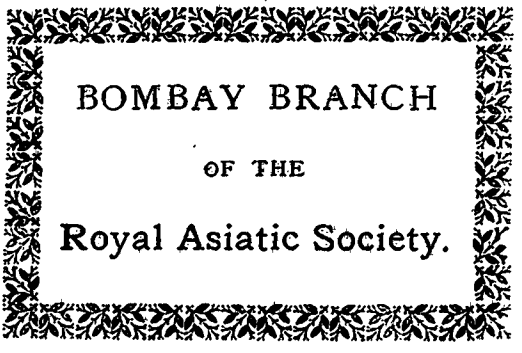

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MOOHUMMUDAN LAW OF INHERITANCE,

AND

Rights and Relations affecting it.

SUNNI DOCTRINE.

COMPRISING

TOGETHER WITH MUCH COLLATERAL INFORMATION, THE SUBSTANCE, GREATLY EXPANDED, OF THE AUTHOR'S

"CHART OF FAMILY INHERITANCE."

BY

ALMARIC RUMSEY,

OF LINCOLN'S INN, BARRISTER-AT-LAW, PROFESSOR OF INDIAN JURISPRUDENCE AT KING'S COLLEGE, LONDON.

Author of "A Chart of Hindu Family Inheritance," &c.

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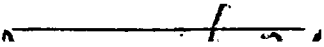
In tenui labor; at tenuis non gloria, si quem
Numina læva sinunt——



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PREFACE

TO

THE THIRD EDITION.

THE Moohummudan law of inheritance comprises, beyond question, the most refined and elaborate system of rules for the devolution of property that is known to the civilised world, and its beauty and symmetry are such that it is worthy to be studied, not only by lawyers with a view to its practical application, but for its own sake, and by those who have no other object in view than their intellectual culture and gratification. Under these circumstances it gives me much satisfaction to be able on this occasion to present its tenets to my readers more fully than heretofore, and, indeed, I may perhaps hope, with something like an approach to completeness.

When the first edition of this work appeared, in 1866, my attention had only recently been turned to Moohummudan law, and I could aim at nothing more than to meet a pressing want, namely, that of an intelligible, if somewhat sketchy, outline of the main features of the subject, previously obscured by want of method, and perhaps, to some extent, by the want of sufficiently care-

ful investigation. In 1872, when my second edition was published, I was unable to add much to the original scheme, for the duties of an official position (entirely unconnected with Indian law) made it difficult for me, at that time, to devote more hours to the work than were absolutely necessary for revising it as it already stood.

In preparing this edition, however, I have been able, and have thought it desirable, first, to enter more fully into the details of the law of inheritance itself, and, secondly, to enlarge very considerably the scope of the work in other respects. There is no doubt that an increasing desire has arisen within the last few years to obtain a sound knowledge of Indian law, and those who would formerly have been contented with a scanty dole from its ancient treasures, will now expect them to be dealt out with a more liberal hand. Several circumstances may have contributed to bring about this change. Of these the most important is probably the alteration of the law which compels Anglo-Indian judges to rely on their own mental resources, instead of having recourse to the assistance of native law officers.* This must necessarily have a retro-active effect on the education of candidates for the Indian Civil Service, and possibly, to some extent, on that of lawyers who seek professional practice in India or at the Privy Council. The publi-

* The Act which put an end to the system of attaching native law officers to the Anglo-Indian courts was passed as long ago as 1864, but its collateral effects may reasonably be supposed to have been of gradual operation.

cation of the Tagore Lectures and other recent works has also, probably, had some effect, and the very knowledge that such studies are attracting more attention than formerly may, in itself, be conducive to fresh popularity. Under these circumstances, the writer on Indian law has now to appeal to a more numerous and better-informed audience than formerly, and it may reasonably be expected that some corresponding improvement should appear in the quantity and quality of the matter which he places before it.

Impressed with these views, I now offer to the public a volume of about four hundred pages, instead of a *brochure* of less than fifty, and I have endeavoured, at every point, to check and substantiate the statements of law by additional authority, to expunge what appears to be erroneous, and to give the precise points of difference whenever there is a conflict of authority. Hence the references are much more numerous, and the original materials of the book have been largely expanded. But, in addition to this, several chapters will here be found which have no prototype at all in the previous editions. It will be remembered that there was not in those editions any attempt to describe minutely the rights of the distant kindred *inter se*, and, consequently, there were no examples respecting those rights. In the present edition, besides entering much more fully into this curious branch of the subject, I have added a new chapter consisting entirely of examples relating to distant kindred.*

* *Vide* Chap. VII.

Another new chapter is that which treats of special rights and disabilities,* in which I have endeavoured to describe every peculiar cause of inheritance or of deprivation of inheritance that may occur, apart from the more familiar rights and exclusions which depend merely on pedigree. Another new chapter follows, consisting of examples on such of the subjects just alluded to as lend themselves to arithmetical illustration.† Finally, as claims of inheritance may be seriously affected by rights depending on wills, dispositions by sick persons, marriage, and dower, the work is further augmented by new chapters giving a succinct, but, it is hoped, a clear and sufficient account of those subjects.‡

The Arabian works which I have consulted for the purposes of the present edition are the Hedaya, the Sirájiyyah, and the Sharífiyyah, while in the preparation of the earlier editions I had recourse only to the Sirájiyyah. A brief account of these works, of their respective authors, and of the earlier authorities on which they rely, may perhaps be useful to the reader as enabling him to form some estimate of the value of the information drawn from them, and such an account will be more suitably placed here than in the body of the work.

The Hedaya, from which most of the information as to wills, marriage, and dower, is taken, and which also furnishes a good deal of supplementary matter relating

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* *Vide* Chap. XIII.

† *Vide* Chap. XIV.

‡ *Vide* Chaps. XV., XVI., XVII.

to inheritance proper, is a treatise dating from the age of our own King Henry II., having been composed by Sheikh Burhan-ad-deen Ali, a voluminous and highly esteemed legal writer, who was born at Marghinan, a city of Maveralne'r (the ancient Transoxania) in the year 530 of the Hegira, and died in 591 of the same æra.* Thus, at a time when our own law was as yet in embryo rather than in infancy, the elaborate system brought into life by the Arabian Prophet and his followers had already arrived at a state of maturity.

The Hedaya was translated from the original Arabic into Persian (with the omission of some portions) by order of Mr. Warren Hastings, when Governor-General of India. The translators were four native moolvees, or Moohummudan lawyers, Gholam Yehee, Molla Taj-addeen, Meer Mohammed Hossein, and Molla Sharreeat Oolla, who intituled their translation "Hedaya Farsee," "the Persian Guide." The English version, to which the references in the present treatise are made, is a translation from the Persian made by Mr. Charles Hamilton, who commenced it under the celebrated Governor-General above mentioned, but was not able to complete it during his tenure of office. In its original form, Mr. Hamilton's translation is somewhat cumbrous and expensive, consisting as it does of four folio volumes,

* The earlier of these dates answers (about) to 1152 A.D. The complete title of the Hedaya is "Al Hedaya fil foroo," "the guide in practical points," the word *foroo* meaning, literally, "branches," as distinguished from *osool*, which signifies "roots."

which are now rather scarce ; but the second edition, prepared (with a few further omissions owing to recent Indian legislation and the like) by Mr. S. G. Grady only a few years back, is more convenient in form and dimensions, and is, of course, easily procurable.

The author of the Hedaya held the legal rank or degree of Moojtahid, which was conferred in former days by the Madrisas, or colleges, and was the highest academical honour to which the learned in the law could attain.* By virtue of this position he was entitled to pass decisions, upon cases real or supposed, which should have the authority of legal precedents. As a writer, however, he lays no claim to individual infallibility, but, in a large proportion of cases, after the clear proposition of law with which his paragraphs generally commence, proceeds to give opinions identical with or differing from his own, so that it is easy to gather what is the earlier authority on which he relies. Even when this is not the case, it need not be concluded that he expresses merely his own judgment, for his frequent reference to older authority makes it much more probable that, when he omits openly to appeal to it, he does so merely because there is a well-known *consensus* of opinion.

The particular sect to which the author of the Hedaya belonged, and whose doctrines he specially records, is that of the Hanifites, or *Ahl Keeas*, the first of the four sects of Sunnis, or Traditionists. The name *Ahl Keeas*, which signifies followers of reason, was given to the

* Hed. xx. i. 3, note.

Hanifites, or followers of Abu Hanifa, as opposed to *Ahl sonna*, or followers of tradition, because, though generally governed by tradition, and therefore properly called Sunnis (as distinguished from the Shias, the other grand division of the Mohammedan world), they were still, as contrasted with the other three Sunni sects (the Malikites, Shafeites, and Hanbalites), somewhat wont to be guided by their own reason and judgment when no positive precept could be found in the Koran. The great early leaders of this sect were its founder Imam Abu Hanifa, his most illustrious disciple Imam Abu Yusuf, and, next in honour and authority to these, his other disciple Imam Muhammed. It frequently occurred that one of these differed from the other two, and occasionally, but rarely, that all the three held different opinions *inter se*. When, in the Hedaya, it is desired to mention Abu Hanifa and Abu Yusuf collectively, they are frequently termed "the two elders," or "the two doctors," while Abu Hanifa and Muhammed are in like manner called "the two extremes," and Abu Yusuf and Muhammed "the two disciples." * The expressions "our doctors" and "all the doctors" are also used occasionally, the former, probably, designating the three lawyers above mentioned, and the latter the authorities of the four Sunni sects generally.

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* Hed. "Introductory address by the Composers of the Persian version." At Hed. ii. ii. "Section" (first). 11, the "two elders" are mentioned as distinct from Abu Hanifa, but this is of course an error, and it is most likely that the "two disciples" are meant. *Vide infra*, 303.

A short biographical notice of the three great traditional authorities of the Hanifites may not be out of place here. Abu Hanifa (Abu Hanifa Naoman bin Sabit) was born at Koofa, the ancient capital of Irak, A.H. 80, when four of the Companions of the Prophet were still living, but it is stated that he did not receive any instructions or traditional knowledge from them. He was brought up by Abu Jafir and Abdoola Ibn Al Mobarick in the doctrines of the Shia sect, but he afterwards seceded from the Shias, and his defection is stated to have originated the distinction between the Shias and Sunnis as legal sects, though, as political parties, they had previously been identified with the followers of the rival houses of Ali and Othman, of which the former had received its death-blow as a temporal power, about A.H. 60, by the slaughter of Hoosein, son of Ali, and his followers, on the blood-stained plain of Kerballa. Abu Hanifa is said to have been a lawyer of surpassing knowledge, and a man of extraordinary gentleness and piety. His modesty was such that he twice refused the office of Kazee, and, on the second occasion, being thrown into prison for his refusal, he died at Bagdad, while still incarcerated, A.H. 150. The doctrines of Hanifa, first promulgated in his native country, were afterwards received in Assyria, Africa, and Transoxania, and his authority as a lawyer is at present acknowledged in India, Tartary, and Turkey.

Abu Yusuf (otherwise called Yacoob bin Ibraheem) was born at Bagdad, A.H. 113. As before mentioned, he studied under Abu Hanifa. His success as a lawyer

was lucrative to an amazing degree, insomuch that he is stated to have earned on one occasion fees to the amount of from eighteen to twenty-five thousand pounds in a single night. He was Kazee of Bagdad under Hadèe, the fourth Khalif of the House of Abbas; and the successor of Hadee, the far-famed Haroon al Rasheed, raised him to the new dignity of Kazee al Kazat, or supreme civil magistrate, which he was the first to hold. It was by the recommendation of Abu Yusuf that fixed courts of judicature were first established, and regular judges appointed, in the Khalif's dominions, and that a distinctive dress was assigned to the doctors of the law. He died at Bagdad, A.H. 182.

Muhammed (Abu Abdoola Mohammed bin Hoosain al Sheibanee) was born at Wasit in Arabian Irak, A.H. 132. After studying, as previously mentioned, under Abu Hanifa, and also under Malik, he superintended an academy or college at Bagdad, and having become famous for his extensive and accurate knowledge of the traditions, was deputed by the Khalif Haroon al Rasheed to superintend the administration of justice in the province of Khorasan. He was no less distinguished for liberality than for industry, and the former quality was conspicuously displayed by his spending a large patrimonial fortune in acquiring knowledge himself and in encouraging those who promoted its spread. His monument is, or was recently, still to be seen at Rai, the capital of Khorasan, where he died, A.H. 179.

The general method aimed at in the Hedaya is simple and practical, and is carried out with a reasonable

degree of consistency. As already stated, the paragraphs usually commence with a definite proposition of law. This proposition is often followed by a distinction of doctrine between Abu Hanifa and one, or both, of his disciples, and not unfrequently by a statement of some adverse doctrine of Malik, Shafei, or Hanbal. This convenient method is varied, occasionally, by references to earlier works, and by the citation of *dicta* of the Prophet himself and of one or two eminent lawyers besides those above mentioned. A reason is generally given for each doctrine, and where differences of opinion are mentioned, the arguments on either side are usually recorded.

In thus making use of the Hedaya as the basis of certain parts of this work, I have followed the method of the author so far as to give all differences of opinion between Abu Hanifa and one or both of his disciples, but I have thought it sufficient to record what appears or claims to be Hanifite doctrine, without mentioning adverse opinions of Malik, Shafei, or Hanbal. My reason for adopting this course is that, as mentioned above, the doctrines that prevail in India are those of the Hanifite sect, while those of the other three Sunni sects are received elsewhere.* Any statement of doctrine, therefore, given in the subsequent pages as drawn from the

* Those of the Malikites in Barbary, and the other northern states of Africa; those of the Shafeites, in Egypt and Arabia; and those of the Hanbalites in a few parts of Arabia. *Vide* Hed. "Preliminary Discourse."

Hedaya, may be assumed to be that of the three Hanifite leaders unless the contrary is mentioned, but the reader must refer to the Hedaya itself if he wishes to know whether any of the other Sunni sects adopt a different view.

The portions of this edition which relate strictly to inheritance itself are still principally extracted from the Sirájiyyah, but I have on this occasion, for the first time, availed myself also of the Sharífiyyah, or rather, of such portions of it as appear in the form a Commentary on the Sirájiyyah, appended by Sir William Jones to his translation of the last-mentioned work.

The Sirájiyyah was composed by Shaikh Siráju'ddín, a native of Sejavend, and the Sharífiyyah by Sayyad Sharíf, who was born at Jurján in Khwárezm near the mouth of the Oxus, and is said to have died at Shiráz, in the year A.H. 814,* at the age of seventy-six. Both works were translated from Arabic into Persian by the order of Mr. Hastings, the translator having been a native lawyer, Maulavi Muhammed Kásim. Sir William Jones, in 1792, published an English version of the former work, to which was appended the Commentary above mentioned, which is a species of very brief abstract of the Sharífiyyah in English, intermixed with the observations of Sir William Jones himself. A reprint of the Sirájiyyah (without the Commentary) was prepared by myself in 1870, with explanatory notes and

* I obtain this date from Tag. Lect. 1873, "Introductory discourse," 48, note.

appendices, and published under the title of "Al Sirájiyyah reprinted." *

The Sirájiyyah is considered to be a work of the very highest authority on the law of inheritance, a branch of jurisprudence which the Hedaya does not formally discuss, but only mentions incidentally here and there. The principles of the Sirájiyyah are, apparently, those of Abu Hanifa, but the opinions of Abu Yusuf and Muhammed are given also, and those of Malik, Shafei, and others outside the Hanifite sects, are occasionally mentioned. The Commentary is useful in certain parts from the additional examples which it contains, and from its giving the answers to some of those contained in the Sirájiyyah, but its value is much impaired by the form in which it is presented to the reader. It is not always possible to discover whether we are reading genuine doctrines recorded by Sharíf or mere conjectures hazarded by Sir William Jones. When the latter clearly speaks for himself he is often hasty, and therefore untrustworthy; and he has a provoking habit of slurring over highly important subjects which imperatively demand further light, on the plea that they are too simple to require elucidation, or that the explanations of the Sharífiyyah are so long as to be insufferably

* The historical and biographical information given above is derived principally from Mr. Hamilton's "Preliminary Discourse" to the Hedaya, and Sir W. Jones's "Preface" to the "Sirájiyyah with a Commentary."

tedious.* Fortunately, some of the most useful passages which are thus neglected by Sir W. Jones have since been rescued from obscurity by Mr. Baillie and Shama Churun Sircar.

In making use of the Sirájiyyah and Sharífiyyah, I have, as before explained with reference to the Hedaya, endeavoured to place before readers the doctrines and differences of the three great Hanifite doctors, without attempting, as a rule, to record the views propounded by the leaders of other sects.

It would have been quite possible to supplement the copious information drawn from the ancient treatises by introducing a few details here and there from the Fatáwa Alamgíri and other comparatively modern works, which are frequently referred to by Mr. Baillie and Shama Churun Sircar. I have thought it better, however, after much consideration, to base this work entirely on the broad and solid foundation afforded by the ancient authorities. The Fatáwa Alamgíri, a compilation commenced about A.D. 1656,† cannot be considered a work of primary or intrinsic authority; while, therefore, it may no doubt be useful for illustration and for citation

* This is notably the case with respect to the curious doctrine of Muhammed as to descent of property among the distant kindred (*vide* Chaps. V., VII.), which would be quite unintelligible in its more complicated applications, but for certain portions of the Sharífiyyah which Sir W. Jones did not think it worth while to translate.

† *Vide* Tag. Lect., 1873, "Introductory Address," 55, note.

in argument, it is perhaps undesirable that its statements of law should be placed side by side with those of a well accepted and paramount authority like the Hedaya. Again, the Fatáwa Alamgíri is only one of a considerable number of similar works,* some of which, perhaps, are of equal rank with itself in the estimation of those most conversant with Moohummudan law, and there might be an appearance of giving undue importance to one particular treatise if I were to cite it frequently when I have no means of citing the others. Apart from these considerations, I could only cite it at second hand, and could seldom, if ever, feel confident that I reproduced its actual words. Mr. Baillie, while acknowledging the Fatáwa Alamgíri as the foundation of large portions of his "Digest," does not pledge himself to literal translation or bind himself down rigidly by references.† Shama Churun Sircar, on the other hand, while constantly giving references to the Fatáwa Alamgíri, usually refers at the same time to Mr. Baillie's Digest, so that it is impossible to judge how far he is indebted to the native and how far to the English treatise.‡ The same remarks, or some of them, apply, more or less, to the Durr-ul-Mukhtár and other works, and I have come to the conclusion, upon the whole, that this treatise will be more

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* A descriptive enumeration of a large number of native treatises on Sunni law may be found in Tag. Lect., 1873, "Introductory Address."

† *Vide* Bail. Dig., Preface, ix.

‡ *Vide* Tag. Lect., *passim*.

satisfactory to the reader, as well as more consistent with its original character, if I refrain from mingling the opinions of more recent writers with the ancient and authoritative *dicta* on which it is based.

Before quitting this subject, however, I may venture to suggest that it would be greatly to the advantage of Moohummudan litigants in our courts if complete translations were to be made by competent persons of the Fatáwa Alamgíri, the Durr-ul-Mukhtár, and other valuable works relating to the Hanifite doctrines. It is also much to be desired that the Sharífiyyah should be translated in full, and that a new translation should be made of the Hedaya, this time from the original Arabic and not from the intermediate Persian. I am not aware whether the funds of the "Tagore Lectureship" foundation could be made in any way subservient to these purposes, but, if so, the practical value of that foundation would be greatly enhanced, and the munificent donor's desire to promote the study of Indian law would be still more effectively carried out than at present.

I am not, unfortunately, competent to decide on the merits of rival systems of orthography, and it will therefore be found that I have left proper names and other Arabic words, as a general rule, pretty much as I found them. In the case of some names which occur frequently both in the Sirájiyyah and in the Hedaya (such as Abu Yusuf and Muhammed), having adopted the spelling of the Sirájiyyah in the earlier chapters, which are chiefly founded on that work, I have retained it throughout for the sake of consistency, though Mr.

Hamilton spells these and other words according to a very different phonetic system.

As the subject of slavery is often alluded to in the following pages, it may be as well to remind the reader that, at the present day, rights arising out of an alleged property in the person and services of another as a slave cannot be enforced by the Anglo-Indian courts.* As an institution of Moohummudan law, however, servitude still exists, and the illustrations connected with it are so numerous and important that I could not conveniently exclude all mention of it from this treatise.

I have every reason to feel satisfied, as a rule, with the treatment which I have received from critics into whose hands this and my other works have come. On one matter, however, involving a point of literary honour, I wish to set myself right. A reviewer of my "Al Sirájiyyah reprinted," though not otherwise unfriendly, charged me with having, for the purposes of that work, borrowed largely from the Sharífiyyah without acknowledgment. As a matter of fact, I had never read a page of the Sharífiyyah at that time, and had borrowed nothing whatever from it, either with acknowledgment or without. The reviewer's observation, however, roused in me a desire to read a book of which, it seemed, I had unconsciously reproduced some features, and I do not therefore regret his mistake, though I feel bound

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* Act v. of 1843, s. 2, and *vide* other sections of the same Act as to property acquired by an alleged slave.

to defend myself against an imputation which, I must venture to think, a thoroughly careful reviewer would not have made.

It is almost needless for me to say how great a satisfaction I have had in the appreciation of the public, testified by a third edition of this work being called for, notwithstanding the very limited number of the persons who take an interest in the subject. It has been no less a source of gratification to me that the Civil Service Commissioners have recommended it for some years to candidates for the India Civil Service; and I trust that the extensive alterations—improvements, let me hope—which have been above described will meet with general approval, and will render the present edition still more acceptable than its predecessors, both to the Commissioners and to the Public.

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TABLE OF ABBREVIATIONS.

Sh.	Sharer.
Res. . . .	Residuary.
D. K. or d. k. . .	Distant Kindred, Kinsman, or Kinswoman.
h. h. s.* . . .	how high soever.
h. l. s.* . . .	how low soever.
Pat.	Paternal.
Mat.	Maternal.
C.	Consanguine.†

* In using the terms "h. h. s." and "h. l. s." we always intend them to apply to the preceding, not to the following, word. Thus, in the Table of Sharers (*infra*, p. 17, &c.), "son's h. l. s. child" means child of a *son h. l. s.*, not *child h. l. s.* of a son.

† We borrow this word from the French language, in which *consanguin* means "related through a common male ancestor." Thus, by consanguine brother, we mean a half brother by the father; by consanguine paternal uncle, the father's half brother by the father, &c.

Throughout this Treatise we purpose to use the words "uterine" and "consanguine" whenever relations of the half-blood are meant. The terms "sister," "brother," &c., when they occur

U.	Uterine.
Tr. Gr.	True Grandparents, Grandfather or Grandmother.
F. Gr.	False ditto.
L. C. D.	Least Common Denominator.
Macn. Princ.	Macnaghten's "Principles and Precedents of Moohummudan Law."*
S. D. A.	"Reports of Cases determined in the Court of Sudder Dewanny Adawlut," Calcutta, 1827, 1834, &c.†
Sir.	"Al Sirájiyyah, or the Mohammedan Law of Inheritance, with a Commentary"; Sir William Jones: Calcutta, 1792. And "Al Sirájiyyah, or the Mahommedan Law of Inheritance, reprinted from the Translation of Sir William Jones; with Notes and Appendix by Almaric Rumsey": London, 1869. N.B.—In the refe-

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alone, will be used to express relationship by the whole blood. But the reader will do well to remember, if he should make use of the Sir., that in that work the terms of relationship usually include both the whole and the half blood unless it is otherwise expressly stated.

* For the convenience of the reader, our references are made to the late Professor Wilson's reprint of portions of Macnaghten's works, intituled "Principles of Hindu and Mohammadan Law," 6th Edition: London, 1871.

† A few volumes of these reports may be found in the Library of Lincoln's Inn. A more ample collection of reports of the Supreme and Sudder Courts exists at the India Office.

	rences to the Sir., the first number indicates the page in the Edition of 1792; the second, the page in the Edition of 1869.
Shar. . . .	"Al Sharífiyyah," the portion of the above-mentioned work intituled "A Commentary on the Sirájiyyah."
Hed. . . .	"The Hedaya," * translated by Charles Hamilton: London, 1791. The same, "Second Edition," by Standish Grove Grady: London, 1870.
Bail. Dig. . .	"A Digest of Moohummudan Law," by Neil B. E. Baillie: London, 1865.
Bail. M. L. I. . .	"The Mohummudan Law of Inheritance," by Neil B. E. Baillie: Second Edition: London, 1874.
Tag. Lect. . .	The "Tagore Law Lectures," 1873, 1874, by Shama Churun Sircar: Calcutta, 1873, 1875.
Rums. Hin. Ch. .	"A Chart of Hindu Family Inheritance," by Almaric Rumsey: Second Edition: London, 1877.

* The references to the Hedaya are usually made by book, chapter, and paragraph; thus, "Hed. xx. iv. 6" means "Hedaya, Book xx., Chapter iv., paragraph 6." Occasional deviations from this method have been found necessary (*e.g.* the introduction of the word "Section") in consequence of some slight irregularities in the plan of the Hedaya. There are no numerals prefixed to the paragraphs in the Hedaya itself, but the author has thought it best to refer to them by number in order to facilitate the verification of his statements.

Wils. Glos. . .	"A Glossary of Judicial and Revenue Terms, &c.," by. H. H. Wilson: London, 1855.

N.B.—The printing of this book had made considerable progress before it became apparent that it would be misleading to speak of it as the Third Edition of "A Chart of Moohummudan Inheritance." Two-thirds of the subjects dealt with being new, and the whole having increased to eight times the bulk of the former book, it was necessary to treat it as a new work, and to give it a name more accurately describing its present scope. The reader is respectfully requested to bear in mind that references to "former editions" allude to the "Chart" above spoken of, while "third edition," and similar expressions, refer to the present work.

MOOHUMMUDAN
FAMILY INHERITANCE.

CHAPTER I.

OBJECT AND SCOPE OF THE WORK.

In countries subject to Moohummudan law, a testator, if he leave any relations, can only dispose of one-third of his net property by will,* and therefore, unless his debts, funeral expenses, &c., exhaust the estate, there is necessarily in almost all cases an intestacy as to a considerable portion.† Under these circumstances the law

* Except when there are no persons entitled by inheritance, or when the persons entitled by inheritance give their consent after the death of the testator.—Sir. 2; 3. Hed. lii. i. 2–4.

† This is shown by the following passage from the Sirájiyyah, an ancient treatise of high authority, translated into English by the celebrated Sir William Jones, and sold at Calcutta "for the benefit of insolvent debtors," in 1792.

"Our learned in the law (to whom God be merciful!) say:—There belong to the property of a person deceased four successive duties to be performed by the magistrate; first, his funeral ceremony and burial without superfluity of expense, yet without deficiency; next, the discharge of his just debts from the whole of

of inheritance (*furaiz*) assumes a far higher importance than it can ever have in our own country. It is not, perhaps, surprising that in communities where intestacy is thus the rule instead of the exception, the canons which regulate the division of property among the relatives of a deceased person should be of a somewhat refined and complicated character. As an instance, let us suppose that a man dies, leaving a father, a widow, a son, and a daughter. His property will be divided as follows :—father, $\frac{1}{6}$; widow, $\frac{1}{8}$; son, $\frac{2}{3}$ of what remains; daughter, $\frac{1}{3}$ of what remains. Such a case as this (a far simpler example than many which occur in practice) is sufficient to upset all our previous impressions, and to show that if we would learn how to solve questions of

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his remaining effects; then the payment of his legacies *out of a third of what remains after his debts are paid;* and, lastly, the distribution of the residue among his successors, according to the Divine Book, to the traditions, and to the assent of the learned." —Sir. 1; 1.

The continuation of this passage, fully defining the successors, will be found *infra*, Chap. XIII.; but the reader may be satisfied for the present with the definition, &c., in our text. The expression "the learned" does not help us where opinions of ancient sages are quoted in support of opposite views, and this happens not unfrequently. Wherever we can elicit the actual opinion of the authors of the Sir. or Hed. we shall endeavour to do so. With regard to Abu Yusuf and Muhammed, Sir W. Jones states (preface to Sir., vii.) that when they both dissent from their master Abu Hanifa, the Mussulman judge is considered to be at liberty to decide either way, whence it may probably be concluded that, when one agrees with Abu Hanifa, and the other opposes him, the opinion of Abu Hanifa is to be followed.

Moohummudan inheritance, we must entirely divest ourselves of any preconceived ideas as to the devolution of property.

The Moohummudan rules of inheritance have been long laid down in books of authority, which agree in most points, though here and there they exhibit slight discrepancies. Several English writers have attempted with more or less success to digest this branch of Moohummudan law, and to place it in an intelligible form before the lawyers of our own country. In spite, however, of what has been effected up to the present time, the subject is much obscured by want of method, and still more by the retention of ancient modes of calculation, which have been, until recently, very insufficiently explained, and, perhaps, not thoroughly understood. Our object in preparing the first and second editions of this work was to endeavour to place the matter more clearly before the reader; first, by exhibiting a chart or tree of the various relations who may succeed; secondly, by explaining the respective rights of these relations according to a systematic arrangement; and, thirdly, by showing that the numerous problems which have hitherto been worked by the Oriental methods, will all readily yield to the power of European arithmetic.* In the present edition we have endeavoured, in addi-

* The Moohummudan writers, and Macnaghten and other English writers in their train, begin by dividing numbers into four different kinds, viz. *mootumasil*, or equal; *mootudakhil*, or one measuring the other; *mootuwafiq*, or having some third number as a common measure; and *mootubayun*, or having no common mea-

tion to what was before attempted, to gather together the most trustworthy information, not merely with regard to inheritance itself, but with respect also to the various subjects which are more or less intimately connected with it. Those who wish to see the somewhat lengthy but highly interesting Arabian system of calculating shares, &c., in actual operation, may gratify their curiosity by inspecting the author's work "Al Sirájiyyah reprinted; with Notes and Appendix," which has been published since the issue of the first edition of this treatise.

Having made these few remarks in order to render our design intelligible, we shall at once enter upon a task which, we trust, will not be altogether useless to those members of the Bar who have to conduct Indian appeal cases before the Judicial Committee of the Privy Council. We shall give references to our authorities where it seems necessary in consequence of our differing from other English writers or inserting matter which we do not find in their works; but, as regards the Sirá-

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sure. They then proceed to lay down no less than seven "principles" or empirical rules for working particular classes of cases. That this is entirely unnecessary must be obvious to every mathematician. It is not surprising that early translators should have feared to amend this curiously complicated machinery, and should have been contented to copy it exactly, just as the Japanese are said to copy a watch or a steam engine, without understanding it. But it is somewhat singular that writers of the present generation have also adhered to the old method, without, apparently, being conscious of the inconvenience involved in its use, or the facility with which a remedy may be applied.

jiyyah, which is a concise treatise, we do not propose to crowd the pages with references on every minute point. As the matter lies in a small compass, it will be sufficient to say that the Sirájiyyah, with respect to the law of inheritance proper, is our main authority throughout, and that, in the absence of any reference in the notes, the reader may assume that we rely on that work.* The Hedaya is a much more voluminous treatise, and we have endeavoured, whenever we have relied on that work, to give an accurate reference.

In concluding our prefatory remarks, it may be as well to state that in this short treatise we do not propose to include the Shia doctrine of inheritance, which pertains only to the sect of Ali (more important in Persia than in India); but we have to add that, for the first time, we propose to go beyond the strict limits of family inheritance, and to deal briefly with other causes of succession which are mentioned by the Mussulman writers.†

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* Those who may wish to read the passages of the Koran on which the doctrines of Moohummudan inheritance are principally founded, will find them quoted from Sale's well-known translation in Tag. Lect., 1873; 78, 79. These passages deal only partially with the subject, but it will be remembered that we are to have recourse not only to the "Divine Book," but "to the traditions, and to the assent of the learned."—*Supra*, p. 2, note.

† In the preface to this Edition a short account will be found of the new matter which has been added.

CHAPTER II.

RULES, DEFINITIONS, AND EXPLANATIONS.

THE law of which we are about to treat applies as between Mussulmans and Mussulmans, but not as between Mussulmans and other persons; for, as will be seen later, Mussulmans cannot inherit from infidels, nor infidels from Mussulmans.* It is, however, laid down that infidels (generally) may inherit from one another;† and it is probable that the Moohummudan law of inheritance would be held to apply to the succession of such persons *inter se*, unless they should have some law of their own by which they would prefer to be guided. In the latter case, however, they would, probably, always be allowed to use their own law, for we know that this has actually happened with respect to the

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* *Infra*, Chap. XIII. † *Ibid.*

Hindus inhabiting Moohummudan states in India; and we also know that this is the case generally with respect to the marriage of infidels.*

There is no distinction, as regards the rules of inheritance, between real and personal property. This may be gathered from the fact that, in the whole of the Sir. and Shar., no such distinction is mentioned, so that the precepts and examples in those books must be taken to apply equally to both kinds. The same remark applies to the Hedaya, which work, although not comprehending in its scheme a regular treatise on inheritance, contains frequent allusions to that topic in its chapters on wills and other subjects. And there is an implied recognition of this doctrine in a passage in the part of that work which treats of *takharij*, or composition of inheritance, where the estate of a supposed deceased person, "liable to be shared among the several heirs," is described as "consisting of lands, or of goods and effects."† Moreover, we are informed by Sir William Jones that Sharif expressly mentions fields and houses as inheritable property.‡

There is no right of primogeniture, so that, for in-

* Hed. ii. v. 1, and *infra*, Chap. XVI.

† Hed. xxvi. iii. "Section" (second) 2.

‡ *Vide* Preface to Sir. (1792) ix.; where Sir W. Jones also says that land and rents are inheritable property in the language of all Mohammedan lawyers; and also Shar. 57, where it is stated (apparently by Sir W. Jones as the result of his own research) that "real and personal property are undistinguished in the laws of the Arabs."

stance, if a man leave three sons, the eldest will take no more than each of the other two. This is shown by the rules which occur as to the division of property among several individuals of a class, which prove conclusively that inequality of division, by reason of age, among persons of the same sex and related to the deceased in the same degree, is not recognised.*

There is not, generally, any right by representation. Thus, if a man leaves two relations of different degrees, as one son and a son of another son, or one brother and a son of another brother, the surviving son or brother will take all, and the grandson, or brother's son, will have no claim as the representative of his deceased parent. And, similarly, if there be two sons of one son or brother, and three of another, and no living sons (or brothers, as the case may be), the five will take equally amongst them instead of the two sets taking the portions which their respective fathers would have had if living.†

The latter position is readily proved by the rules of equal division above referred to. The former is shown, with respect to sons and other relations of the kind called residuaries,‡ and also with respect to certain of the relations called distant kindred,§ by the rules which

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* *Vide infra*, 21, note, 53, note, and authorities there referred to.

† In European phraseology, the sons' sons or brothers' sons will take *per capita* and not *per stirpes*.

‡ As to who are residuaries, *vide infra*, 12, and Chap. IV.

§ As to who are distant kindred, *vide infra*, 12, and Chap. V.

give the preference to relations nearer in degree.* And with respect to sons' h. l. s. daughters, who are the only relations of the kind called sharers† to whom the former can possibly apply, it is shown by express authority that it governs their rights, equally with those of the other classes of persons above mentioned.‡

There are, however, instances in which the operation of a principle of representation can be plainly discerned. Thus, we find that U. brothers and sisters, when they inherit, take $\frac{1}{3}$ amongst them (whereas sisters and C. sisters, when there are two or more, take $\frac{2}{3}$), apparently because $\frac{1}{3}$ is, primarily, the mother's share.§ Similarly, in the second and fourth classes of D. K., and among the descendants of the fourth class, $\frac{1}{3}$, as the mother's share, goes, under certain circumstances, to the maternal side; and $\frac{2}{3}$, as the father's share, to the other side.‖ And, according to the doctrine of Muhammed, a principle of distribution among remote relations according to the sexes, &c., of the "roots" or intermediate relations ought to be generally adopted, an opinion which, in some instances at least, seems to be generally accepted.¶ It would seem probable, therefore, that the principle of representation has always met with a certain limited approval, though it has been

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* *Vide infra*, Chaps. IV., V., and authorities there referred to.

† As to who are sharers, *vide infra*, 11, 12, and Chap. III.

‡ *Vide infra*, Chap. IV.

§ *Vide infra*, 18, note.

‖ *Infra*, Chap. V.

¶ *Infra passim*, especially Chap. V.

over-ridden in the more ordinary applications of the law by the stronger principles of equality of division and preference of the nearer in degree.

There is no distinction between ancestral property and property which the deceased has himself acquired. This may be safely inferred from the absence of any mention of such a distinction in the Sir. and Shar., and from the consideration that the British Courts in India, to which the distinction between ancestral and acquired property has become familiar in the Hindu law, have not, it would appear, been called upon to recognise any such distinction in the case of property left by deceased Moohummudans.*

A person taking by inheritance cannot disclaim; in other words, inheritance requires no acceptance, and cannot be annulled by rejection; while, on the other hand, a bequest may be accepted or rejected at pleasure.† It seems to follow that, if a person entitled by inheritance purport to reject the property inherited, it will nevertheless be his during his life, and will go, after his death, to his heirs or other successors, and not to those of the person from whom he inherited.

The proprietary right of a person taking by inheri-

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* The object of all these negative statements is to save the reader from the risk of falling into error by assuming principles to exist in Moohummudan law which may have become familiar to him as being recognised in the English, the Hindu, or other systems that he may have studied.

† Hed. lii. i. 12, 17. As to bequests, *vide infra.*, Chap. XV.

tance is considered to be established in him, not *de novo*, but by succession and descent from the deceased, so that it operates to keep alive rights or liabilities which affected the property during the lifetime of the deceased. Thus, if a slave purchased by the deceased form part of the inherited property, and the inheritor find any fault or defect in the slave, he may return such slave to the seller. And, *e. converso*, if the deceased have sold part of his property before his death, and the buyer find any defect in the part that he has bought, the latter may return the part so bought to the person who has inherited the rest of the property.*

For the purposes of the law of inheritance the entire body of the relatives† of a deceased person, together with the husband or wife, are divided in three classes, viz :— Sharers, Residuaries, and Distant Kindred. The first two classes are frequently mentioned under the common name of "heirs." ‡Sharers (*zaví-ul-farúz*) are those who

* Hed. lii. i. 12.

† As to inheritors by other titles than relationship or marriage, *vide infra*, Chap. XIII.

‡ Some English writers make use of the word "heirs" as inclusive of the D. K. We prefer, however, to adhere to the old nomenclature which limits the scope of the word in question to the sharers and residuaries. By neglecting this distinction several writers have made unintelligible a well-known doctrine, which, in itself, is clear and reasonable. This is the doctrine stated in Sir. 30; 35; Macn. Princ. 159; Tag. Lect., 1873, 148, &c.; Bail. M.L.I., 90; *infra*, Chap. V., &c.; which, in regulating the order of inheritance of certain classes of the D. K. among themselves gives precedence to those who are related through heirs, a doctrine which becomes mere nonsense if the D. K. them-

(with one exception, mentioned in a later chapter)* are entitled to a prescribed fractional part; *e.g.* a wife, under certain circumstances, takes $\frac{1}{4}$; a father $\frac{1}{6}$; a daughter, $\frac{1}{2}$, &c. Residuaries (*asabah*), sometimes called "residuaries by relation," to distinguish them from "residuaries for special cause" (*vide infra*, Chap. XIII.), are those who take no prescribed fractional part, but, generally, divide the residue among them after the sharers are satisfied, and the whole if there are no sharers.† Distant Kindred (*zaví-ul-arhám*), sometimes termed "the more distant kindred," are all relations who are neither sharers nor residuaries.‡ When there are no sharers,

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selves are heirs, since, in such case, all must be related through heirs. This confusion is avoided by using the word in its limited sense. In the Hedaya, the word "heirs" is generally used in a wider sense, so as to include in its scope the D. K. and also persons other than relations who may be entitled to inherit. We shall always, however, endeavour to avoid ambiguity by confining the word "heirs," in these pages, to the sense above given in our text, and substituting the words "inheritors," "persons entitled by inheritance," or the like, when we have occasion to refer to "heirs" in the sense in which the word is used in the Hedaya.

* The exception alluded to is that of hermaphrodites, who, according to some authorities, may be sharers, but whose share depends entirely on the particular circumstances.—*Vide infra*, Chap. XIII.

† Sir. 2; 2. By the rules of exclusion, however, residuaries may sometimes even be preferred to sharers.—*Vide infra*, Chap. X.

‡ Sir. 28; 33. This important definition has been overlooked by some English writers. The absence of such a definition naturally tends to create an erroneous impression that the right of inheriting is limited within certain degrees or classes of relations, instead of extending, as it really does, to the whole kindred of the

residuaries by relation, or residuaries for special cause, the distant kindred take the whole among them according to certain rules.

If one of several heirs agree to take a specific object in lieu of his proper fractional portion as sharer or otherwise, the other heirs divide the remaining property among them in the ratio of their respective fractional portions. Thus, if the portions be $\frac{1}{2}$, $\frac{1}{3}$, and $\frac{1}{6}$, and the person entitled to $\frac{1}{2}$ take a specific object instead, the other two will divide the remainder in the ratio $\frac{1}{3} : \frac{1}{6}$, or 2 : 1.*

The reader may now, on referring to the chart, ascertain what relations come under these several heads.

In order, however, to make the chart perfectly intelligible, it is desirable to add a few words of explanation. Those persons who are designated "Sh. and Res." are persons who, though primarily sharers, may, under certain circumstances, be residuaries.†

Those who have no designation attached (as "mother's husband") are not either Sh. or Res., and are only inserted as part of the machinery of the pedigree, in order to bring in the C. and U. relations.

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deceased. The expression "distant kindred" is used for convenience, having been adopted by Sir William Jones (in his translation of the Sir.) and by subsequent writers. It will be seen, however, that a d. k. is not *necessarily* more remote than a sharer or a residuary.—*Infra*, Chap. V.

* Sir. 21; 26; Shar. 88, 89. The taking of a specific object instead of a fractional portion is sometimes called "subtraction."

† See *infra*, Chap. IV.

The distant kindred are not inserted in the chart, as their definition is purely negative, viz. those relations who are neither sharers nor residuaries.*

The ancestors of the deceased are divided into true and false grandfathers and grandmothers, and only the true are inserted in the chart, as the false are distant kindred. The true grandfathers, or "true male ancestors," as they are also designated, are those between whom and the deceased no female intervenes.† They can therefore only be found in one line, namely, that described as father's father h. h. s. True grandmothers, or "true female ancestors," on the other hand, are those between whom and the deceased no F. grandfather intervenes;‡ and it is clear that they may exist in several lines. Thus, we have in the chart the mother's mother h. h. s.; the mother h. h. s. of the father's father h. h. s. &c.

The following are instances of false grandparents; father's mother's father, mother's father's father (because a female intervenes), and mother's father's mother (because a false grandfather intervenes).

We append a scheme of grandparents, in order to illustrate the above remarks. The true are printed in Old English, and the false in ordinary type. The male

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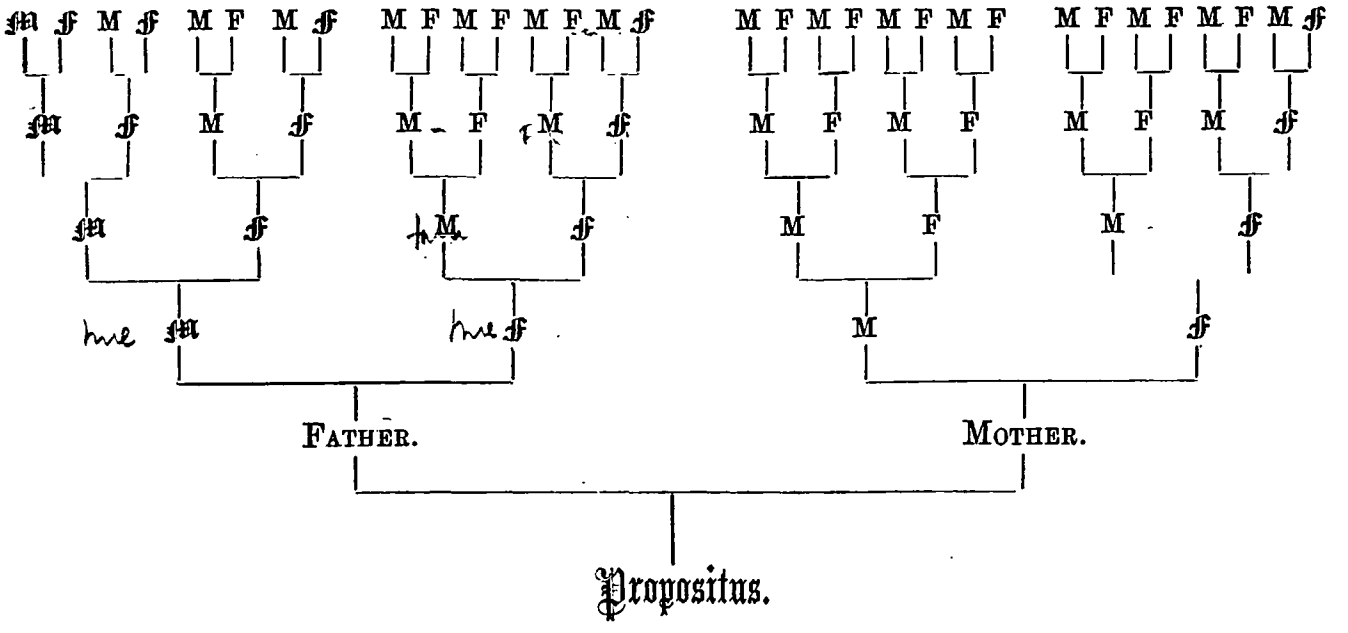
* *Supra*, 12.

† Sir. 3; 4.

‡ Sir. 3; 4.—This simple and intelligible definition is overlooked by several writers, who have succeeded in making the subject of grandparents appear to be one of hopeless complication.

SCHEME OF GRANDPARENTS,

SHOWING THE TRUE AND FALSE UP TO FIVE GENERATIONS.



ancestors are designated M or 𝔐, and the female F or 𝔉. It will be observed that in this ascending pedigree the female sex has a decided advantage, inasmuch as, in a total of 60 grandparents, there are 26 false males and only 16 false females.

In case of the deceased having made a will and appointed an executor, such executor has certain functions which may affect the persons entitled by inheritance. For these, and other matters connected with wills, we must refer the reader to a later chapter.*

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* *Vide infra*, Chap. XV.

CHAPTER III.

OF SHARERS AND THEIR RESPECTIVE SHARES.

FROM the chart, it will be seen that there are four male and eight female sharers. Their respective shares are shown in the following table.*

Husband	$\frac{1}{4}$	when there is a child or son's h. l. s. child.†
,, ...	$\frac{1}{2}$	when not.

* This table is founded on the chapters "On the doctrine of shares" and "On women" in the Sirájiyyah, p. 3; 4; &c.

† The existence of a daughter's child (or, *à fortiori*, a son's h. l. s. daughter's child) could not, of course, have any effect on the husband's share, as such a child is a d. k.—Sir. 29; 34; &c. It would not have seemed necessary to make this remark had not the contrary been erroneously stated in Tag. Lect., 1874, p. 182. The author of the lectures, in another place, states the doctrine correctly, though with some confusion of language.—*Vide* Tag. Lect., 1873, 80. These remarks apply wherever the expression "son's h. l. s. child" is used in the table. With regard to this expression it must also be remarked that if the reader should consult the

Father	$\frac{1}{6}$
Tr. Grandfather h. h. s. .	$\frac{1}{6}$ when not excluded.
U. Brother or Sister* .	$\frac{1}{6}$ when only one, and no child, son's h. l. s. child, father, or Tr. grandfather.
„ „ .	$\frac{1}{3}$ when two or more, and no child, &c.
Wife	$\frac{1}{8}$ when child or son's h. l. s. child.
„	$\frac{1}{4}$ when not.
Daughter . . .	$\frac{1}{2}$ when only one and no son.
„ . . .	$\frac{2}{3}$ when two or more and no son.

Shar., he must be on his guard against being misled by the words "male issue of a son," "issue of a deceased son," and the like, which are sometimes used (*e.g.* Shar. 65, l. 22; 66, ll. 3, 4; 68, ll. 4. 5), where "son's h. l. s. child," "son's h. l. s. issue," or some expression having the same meaning, ought, strictly speaking, to be used.

* We have placed U. brother and U. sister together, because they stand on precisely the same footing; thus affording an exception to the rule of a double share to the male, which occurs so frequently that it may be considered a general rule.—Sir. 4; 6. It will be observed that two or more relations of this kind, whether of the same or of different sexes, take $\frac{1}{3}$. This is sometimes spoken of as the "mother's portion," or "mother's allotment," for it is the share that she would primarily be entitled to. In like manner the remaining fraction, $\frac{2}{3}$, is spoken of as the "father's portion," or "father's allotment," for, if he and the mother stood alone,

Son's h. l. s. Daughter*	.	$\frac{1}{2}$ when only one and no child or equal or higher son's son.
,, ,,	.	$\frac{2}{3}$ when two or more, and no child or &c.
,, ,,	.	$\frac{1}{6}$†when one daughter or higher son's daughter and no son or &c.
Mother		$\frac{1}{6}$ when child or son's h. l. s. child; or two or more brothers or sisters or C. or U. brothers or sisters.
,, ...		$\frac{1}{3}$ when not.

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he would take (partly as sharer and partly as residuary) all that remains after payment of the mother's share. It would naturally be expected from the above that the U. brothers and U. sisters would take nothing when there is a mother; but this is not so, as will be seen from the table of sharers. This point will be further mentioned in the portion of the work which treats of exclusion.

* "Son's daughter, or other female descendant h. l. s."—Sir. 3; 4. But this evidently means son's h. l. s. daughter, since daughters' children, sons' daughters' children, &c., are in the first class of D. K.—Sir. 29; 34, and *infra*, Chap. V. See also, as to these relations, the case of *tashbib*, which clearly shows that they are all related through an unbroken male line; Sir. 5; 8, 9, and *infra*, 38.

† The theory is this; the daughter, or higher son's daughter, takes $\frac{1}{2}$ and leaves $\frac{1}{6}$ for the proposed son's daughter; but if there be two or more daughters, or higher son's daughters, they take their $\frac{2}{3}$, and there is nothing left for the proposed son's daughter.

Mother (but) . . .	$\frac{1}{3}$ of remainder only after deducting wife's or husband's share, when a wife or husband and a father, (*secus** if a Tr. grandfather instead of a father.)
Tr. Grandmother h. h. s. .	$\frac{1}{6}$ when not excluded.
Sister	$\frac{1}{2}$ when only one, and no son, son's son h. l. s., father, (perhaps Tr. grandfather), daughter, son's daughter, or brother.
,, ...	$\frac{2}{3}$ when two or more, and no son, &c.
C. Sister	$\frac{1}{2}$ when only one, and no son, &c., C. brother, or sister.
,, ...	$\frac{2}{3}$ when two or more, and no son, &c., C. brother, or sister.
,, ...	$\frac{1}{6}$ when one sister, but no son, &c., or C. brother.

* But, in Abu Yusuf's opinion, the presence of "a grandfather" has the same effect as that of the father (Sir. 8; 11). Of course a true grandfather is meant, for a false grandfather is a d. k. (*infra*, Chap. V.), and his presence could not, therefore, under any circumstances, affect a sharer's interests.

U. Sister. . . . (*Vide supra*, U. brother or sister.)

Several of the above-mentioned classes of sharers may, under some circumstances, become residuaries also, or residuaries only. We shall recur to this subject in Chapter IV.

In making use of the above table of shares, it must be borne in mind that two or more of a particular class (except where otherwise specified) take equally among them the same portion that one of that class, if alone, would take ;* *e.g.* one wife taking $\frac{1}{8}$, two wives will take $\frac{1}{8}$ between them ; and, the share of a true grandmother being $\frac{1}{6}$, three Tr. grandmothers will divide $\frac{1}{6}$ among them. With regard to Tr. grandmothers, however, the following disputed point occasionally arises. If one of two Tr. grandmothers be related by two lines, and the other only by one, (as if one be the father's father's mother and also the mother's mother's mother, while the other is only the father's mother's mother,) it is

* This position would scarcely seem to require proof, since it may reasonably be inferred from the circumstance of the share being given to several persons (*e.g.* "one or more" wives, "two or more" daughters, Sir. 4, 5 ; 7, 8 ; and the like) without any direction for unequal division. The doctrine, however, receives express confirmation from the rules given for ascertaining the portion of each individual in a class ; for each such portion is to be calculated by the same process, and therefore the portions must necessarily be equal.—Sir. 19 ; 24. The same reasoning applies equally to residuaries. As to wives, the doctrine is expressly declared, Shar. 68.

said by Muhammed that the former will then take $\frac{2}{3}$, and the latter only $\frac{1}{3}$, of the share. And in like manner it is maintained by the same master that if one Tr. grandmother be related by three lines, and the other only by one, (as if one be father's father's father's mother, father's mother's mother's mother, and mother's mother's mother's mother, while the other is only father's father's mother's mother,) the former will take $\frac{3}{4}$, and the latter only $\frac{1}{4}$, of the share. Abu Yusuf, however, in both the above cases, maintains that the two grandmothers will take the share equally between them.*

According to some writers, Abu Hanifa is of the same opinion as Abu Yusuf on this point;† and if this be considered as established, that opinion will, no doubt, prevail.

The principle advocated by Muhammed, however, if accepted at all, must, no doubt, be extended even to higher generations, if such can be supposed to exist. It may be generally stated thus; any particular Tr. grandmother takes, in the division of the Tr. grandmother's share, as many parts as there are lines through which the propositus is descended from her. Thus, if we suppose one Tr. grandmother to be related, as such, through n lines, and another only through one line, the $\frac{1}{6}$ must be divided into $(n+1)$ parts, of which the former

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* Sir. 9; 12; Shar. 75, 76.

† Tag. Lect. 1873; 114, 115.

will take n, and the latter only 1. In other words, the former will take $\frac{n}{6\,(n+1)}$, and the latter $\frac{1}{6\,(n+1)}$ of the whole estate. It will be found hereafter that the principle of claiming through different lines, though disputed by Abu Yusuf in many of its applications, appears to be generally admitted in respect of some descriptions of the D. K.*

It will readily be seen that the difference of opinion above mentioned cannot arise in respect of Tr. grandfathers, for they can only exist in one line. And an examination of the table of sharers will show that there are, in fact, no persons other than true grandmothers who can be sharers by more than one chain of connection with the deceased.†

It will be gathered from the above table that the shares are subject to a variety of alternatives and exceptions. The alternatives appear sufficiently in the table itself; the exceptions will be treated of *infra* in Chapters IV. and X., on "Residuaries" and "Exclusion." But it may be as well to mention here that the alternatives take effect notwithstanding that the relations whose presence causes them may be deprived of a share themselves. Thus the mother takes $\frac{1}{6}$ instead of $\frac{1}{3}$ when there are two brothers or sisters, &c., even when those relations are prevented, by the presence of the father, from taking anything themselves.

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* *Infra*, Chap. V.

† *Vide supra*, 17, &c.

In connection with the inheritance of husband and wife, the reader may find it useful to study the law of marriage, as briefly set forth in a later Chapter.* But it may be as well to mention here that the marriage of an infant, properly contracted by his (or her) guardian, is voidable, not void; so that, if such infant die, whether before or after attaining the age of maturity, the wife or husband surviving will be entitled to the usual share; while, on the other hand, if the infant be contracted by an unauthorised person, it is void, unless cured by the assent of the person so contracted, so that, if either party die before such assent be duly expressed or implied, the survivor cannot inherit.†

* *Infra*, Chap. XVI.

† Hed. ii. ii. 15. As to the subject of marriage of infants, generally, *vide infra*, Chap. XVI.

CHAPTER IV.

OF RESIDUARIES.

It will be seen that the persons mentioned in the chart who are primarily residuaries, in other words, the residuaries who cannot be sharers, are,—the son; son's son, h. l. s.; brother; C. brother; brother's son, h. l. s.; C. brother's son, h. l. s.; Pat. uncle; C. Pat. uncle; Pat. uncle's son, h. l. s.; C. Pat. uncle's son, h. l. s.; and, finally, great uncle, great great uncle, and all the more remote male relations, through males (in other words, Pat. and C. Pat. uncles of the father and father's father, h. h. s., and their sons, h. l. s.), for a male residuary is "every male, in whose line of relation to the deceased no female enters."* No female relative is primarily a residuary.

* Sir. 10; 12, 13.—This will be further mentioned when we come to treat generally of the succession of residuaries (*vide infra*, 45, &c.). The point would not call for particular notice but for a misapprehension of Mr. Macnaghten, which seems

Several of the persons enumerated in Chapter III. as sharers may under some circumstances become either residuaries only instead of sharers, or residuaries as well as sharers. These are designated in the chart as "Sh. and Res." The following are the circumstances under which they respectively become residuaries:—*

Father.—When there are daughters, or daughters of a son, h. l. s.,† and no sons, he takes, in addition to his share, $\frac{1}{6}$, the residue after their shares are satisfied. In default of children or son's h. l. s. children,‡ he has a "simple residuary title." It will perhaps be more con-

to have arisen partly from overlooking the definition quoted in our text, and partly from mistaking an enumeration of "classes" (Sir. 10; 13) for an enumeration of the whole body of residuaries. Misled by this double error, Mr. Macnaghten makes the D. K. begin after, in other words, the residuaries end with, the Pat. uncle and C. Pat. uncle and their sons' sons h. l. s.—*Vide* Macn. Prin. 158.

* It may perhaps be as well to mention that males who are residuaries are sometimes called "residuaries in their own right"; females who become residuaries by the presence of a male, "residuaries in another's right," "residuaries by another," or "residuaries through another"; and those who become so by the presence of another female, "residuaries together with another," or "residuaries with another."—Sir. 9; 12, &c.

† *e.g.* Daughters of a son's son, not daughters of a son's daughter, as those would be among the D. K.—(*infra*, Chap. V.)

‡ Sir. 4; 5.—In the Sir., "children and son's children or other low descendants," but of course this means other low descendants who are sharers or residuaries. In other words, as he excludes all collaterals, and all ancestors except the mother and Tr. maternal grandmother (*infra*, Chap. X.), and as there are in the supposed case no descendants who are sharers or residuaries, he takes the residue after payment of the share of wife or husband, and mother

venient to abandon the ancient phraseology, and to say that where there are sons h. l. s. the father only takes his share, $\frac{1}{6}$, and that when there are none he is a residuary also. The rule thus stated will include all the cases. Thus, if a father and two daughters are the only claimants, the father first takes $\frac{1}{6}$, then the daughters take $\frac{2}{3}$ or $\frac{4}{6}$, and the father has the remaining $\frac{1}{6}$. And if there be a father and mother, and no children or son's h. l. s. children, the father first takes $\frac{1}{6}$, the mother $\frac{1}{3}$ or $\frac{2}{6}$, and then the father has the remaining $\frac{3}{6}$ or $\frac{1}{2}$.

True grandfather.—Takes, generally, the father's portion both as residuary and as sharer when there is no father.* Thus, if the only heir be a Tr. grandfather, he takes his share, $\frac{1}{6}$, and takes the rest of the property as a residuary; if the heirs be a Tr. grandfather and several daughters, the Tr. grandfather takes $\frac{1}{6}$, the daughters take $\frac{2}{3}$, and the Tr. grandfather takes the remaining $\frac{1}{6}$.

Notwithstanding this general resemblance, however, the rights of the Tr. grandfather may, in four particular cases, be inferior to those of the father, on account of the greater distance of the former from the deceased.†

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or Tr. mat. grandmother. We must take the expression "low descendants" in the above limited sense, for we know that D. K. cannot come in when there is a father living. (See definition of D. K., *supra*, p. 12.)

* Sir. 4; 6.—And, it must be assumed, no intermediate true grandfather.—See Doctrine of Exclusion, Chap. X.

† The Sir., in the place above referred to, states that "the Tr. grandfather has the same interest with the father, except in four cases, which we will mention presently, if it please God." These

The fourth and last of these cases (taking them in the order in which they are given in the Shar.) relates to a residuary for special cause, and will be mentioned later in its proper place.* The first case will arise when the heirs are the father's father and father's mother, for the father's mother is entitled to $\frac{1}{6}$, so that the father's father will take what is left after payment of $\frac{1}{6}$, while the father would have excluded the father's mother, and would thus have had the whole. The same reasoning applies, *mutatis mutandis*, to other heirs who are similarly situated; as, for instance, to a father's father's father inheriting together with a father's father's mother.†

The second case will be understood from the table of sharers,‡ where it appears that the mother, under certain circumstances, takes only one-third of the residue when there is a father, but one-third of the whole estate when there is a Tr. grandfather. Here, again, the Tr. grandfather's rights are less than those of the

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"cases" form the subject of some passages in the Shar., and of a later chapter in the Sir., but the author has thought it more logical to treat some of them in this place. As, however, it will be necessary, in doing so, to touch upon various doctrines which have not yet been explained, the reader will perhaps do well to read Chaps. VI., VIII., X., before applying himself to the subject now under consideration.

* This point is dealt with in Chap. XIII., *infra*.

† Sir. 8, 9; 12; Shar. 67; and, as to doctrine of exclusion, *infra*, Chap. X.

‡ *Supra*, 19, 20.

father would be, though the extent of the difference must, of course, depend upon the particular circumstances.

The third case can only arise if it be admitted that the brothers and sisters, and C. brothers and sisters, are not excluded by the Tr. grandfather. It will be seen that there are conflicting views as to this exclusion; * and, as the author of the Sirájiyyah does not express a decided opinion on the subject, it may be desirable to consider the alternative which leads to a modification of the Tr. grandfather's rights.†

Supposing, then, that the Tr. grandfather does not exclude these relations, he will, of course, obtain less, when in combination with them, than the father, who excludes them.‡ It would be sufficient to leave the matter here, and to trust to the usual rules for division of property among sharers and residuaries,‡ had not the author of the Sirájiyyah recorded a very singular set of special rules for distribution of the estate under these circumstances. The following is an exposition of these rules, and of the examples which illustrate them,

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* *Infra*, Chap. X.

† Abu Hanifa considers that the Tr. grandfather does exclude the relations above mentioned, and Abu Yusuf and Muhammed that he does not. According to Sir William Jones, therefore, this is a point on which the Mussulman judge is at liberty to decide either way.—*Vide supra*, 2, note.

† *Vide* Chap. X.

‡ *Vide* Chap. VI.

so far as we have been able to understand them ; but the reader will do well to remember that the author of the Sirájiyyah merely gives them as the doctrine of one person, Zaid the son of Thábit, and does not distinctly state whether they meet with his own approval or not.*

According, then, to Zaid the son of Thábit, the Tr. grandfather, when he inherits with relations of this description and there are no other relations who are sharers, takes either a special allotment called the share from *mukásamah* (division), or $\frac{1}{3}$ of the whole estate, whichever is the "best," in other words, the greater. The share from *mukásamah* is ascertained by supposing the Tr. grandfather, *pro hâc vice*, to form one of a class of residuaries with the brothers, &c., the actual brothers and sisters being placed on an equality with the C. brothers and sisters for the purpose of this calculation, but not for the purpose of succeeding,† and the usual rule of a double share to a male being adhered to.

Thus, if there be with a Tr. grandfather one sister and two C. sisters, it is clear that the Tr. grandfather's share from *mukásamah* will be $\frac{2}{5}$, which he will take, as being preferable to $\frac{1}{3}$ of the whole. So, if there be one sister and one C. sister, the Tr. grandfather's share from *mukásamah* will be $\frac{2}{4}$, or $\frac{1}{2}$, which he will take in preference to $\frac{1}{3}$ of the whole.

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* These rules, &c. will be found in the Chapter intituled "On the Division of the Paternal Grandfather," Sir. 24; 29.

† As to the inferiority of C. brothers and sisters to actual brothers and sisters in point of succession to inheritance, *vide supra*, 20; *infra*, 50, 51, and Chap. X.

But if there be also other relations who are sharers, the rule is different, the Tr. grandfather then taking, after payment of the shares (subject, however, to proportional abatement if it prove to be a case of increase), his share from *mukásamah*, a third of the residue, or $\frac{1}{6}$ of the whole, whichever may be the greatest.

Thus, first, if there be a husband and a brother, the husband will take his share, $\frac{1}{2}$, and the share from *mukásamah* will be half the residue, or $\frac{1}{4}$, which the grandfather will take, as preferable to a third of the residue or $\frac{1}{6}$ of the whole.

Secondly, if there be a Tr. grandmother (not excluded),* two brothers, and a sister, the Tr. grandmother will take her share, $\frac{1}{6}$; and the Tr. grandfather will therefore take a third of the residue, or $\frac{5}{18}$, as preferable to the share from *mukásamah*, $\frac{5}{21}$, or to $\frac{1}{6}$ of the whole.

Thirdly, if there be a Tr. grandmother (not excluded),* a daughter, and two brothers, the Tr. grandmother and daughter will take respectively $\frac{1}{6}$ and $\frac{1}{2}$, and the Tr. grandfather will take $\frac{1}{6}$ of the whole, as being preferable to $\frac{1}{9}$, the share from *mukásamah*, or $\frac{1}{9}$, the third of the residue. Similarly, if there be a husband, a daughter, a mother, and a sister or C. sister, the shares of the husband, daughter, and mother, respectively, will be $\frac{1}{4}$, $\frac{1}{2}$, and $\frac{1}{6}$; and the residue being only $\frac{1}{12}$, $\frac{1}{6}$ of the whole will obviously be greater than the share from

* The author inserts these words, because a true grandmother might be excluded by the true grandfather, *vide infra*, Chap. X.

mukásamah or a third of the residue ; the grandfather will therefore, primarily, take $\frac{1}{6}$. The sister or C. sister is, in this case, a residuary (*vide infra*, 42, 44); and, as the shares exhaust the whole, she will take nothing. This is a case of increase (*vide infra*, Chapter VIII.), and the denominator must be increased from 12 to 13. It will then be easily ascertained that the Tr. grandfather will take $\frac{2}{13}$.

In one particular instance, however, called the case of *acdaríyyah*, where the Tr. grandfather would, by the ordinary application of the above rules, take $\frac{1}{6}$ of the whole, some violence is done to the doctrine of *mukásamah* in order to give him a larger portion. The case of *acdaríyyah* is as follows:—Husband, mother, sister or C. sister. Here the husband's and mother's shares are respectively $\frac{1}{2}$ and $\frac{1}{3}$, so that the residue is only $\frac{1}{6}$, and $\frac{1}{6}$ of the whole estate is obviously better for the Tr. grandfather than either the *ordinary* share from *mukásamah* or a third of the residue. But, instead of taking this, as in the previous example, the Tr. grandfather adds it to the natural share of the sister, $\frac{1}{2}$, and thus by a kind of spurious *mukásamah* obtains, primarily, $\frac{4}{9}$; while the sister takes, primarily, $\frac{2}{9}$. Hence the total shares are $\frac{1}{2}$, $\frac{1}{3}$, $\frac{4}{9}$, and $\frac{2}{9}$. The case is obviously one of increase, and it will be found, on working it out, that the ultimate share of the Tr. grandfather is $\frac{8}{27}$, which, it will be observed, is more than he would otherwise have had.

The author of the Sirájiyyah introduces this case by saying that Zaid has not "placed" the sister or C.

sister "as entitled to a share with the grandfather, except in the case named *acdáriyyah*"; and he follows it with the observation that "if, instead of the sister, there be a brother or two sisters, there is no increase, nor is that a case of *acdáriyyah*." The former of these statements cannot, it would seem, be taken to mean that the sister does not take any portion at all in any other case, for the instances given in the Sir., evidently on the authority of Zaid himself, show the contrary.* It may fairly be presumed that they merely signify this: that the case of *acdáriyyah* affords the only instance in which the *natural* share of the sister, together with that of the tr. grandfather,† is allowed to enter into the calculation of the share from *mukásamah*.

It will be desirable, before quitting this subject, to consider generally the rights of brothers, &c., thus participating together with a Tr. grandfather, as laid down by Zaid or reasonably deducible from his rules.

As to brothers and C. brothers, when both exist, although these relations are placed together for the purpose of finding the share by *mukásamah*, the C. brothers are "removed" afterwards, "as if disinherited"; in other words, the usual rule of exclusion resumes its force, and the brothers, exclusive of the C. brothers, divide amongst them what remains after payment of the Tr. grandfather's portion.

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* Sir. 25; 30; and *infra*, 34, &c.

† The reader will remember that $\frac{1}{6}$ is the natural share of the Tr. grandfather, *vide supra*, 18.

When a sister comes together with C. sisters or a C. sister, and there are no other relations who are sharers, the principle is the same. It must be borne in mind, however, that the sister is a sharer, and can take no more than her proper share, as such, after the grandfather has taken his portion. Thus, in the instance above given of one sister and two C. sisters,* the sister will take her natural share, $\frac{1}{2}$, and the C. sisters will take the remaining $\frac{1}{10}$ between them, or $\frac{1}{20}$ each; and, in the case of one sister and one C. sister,† the sister will again take $\frac{1}{2}$; but, as that, with the Tr. grandfather's share, exhausts the estate, the C. sister will get nothing. It must be concluded, *à fortiori*, that C. sisters will take nothing if there be more than one sister; and this, we know, is in accordance with the general law.‡

It would seem that the same principles must be applicable to cases of sisters, &c., when there are other relations who are sharers, notwithstanding the words which have been mentioned above§ in apparent derogation of the sisters' rights; for those words are general, and, if allowed to operate against the sisters', &c. rights in the cases now under consideration, would operate against them equally in the cases just given above. Concluding, then, that the same principles will operate, let us suppose that there be a Tr. grandmother and a sister; the Tr. grandmother's share is $\frac{1}{6}$, the share

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* *Supra*, 30.
† *Ibid.*
‡ *Infra*, 44.
§ *Supra*, 32, 33.

by *mukásamah* is $\frac{2}{3}$ of $\frac{5}{6}$, or $\frac{5}{9}$, which is greater than one-third of the residue, $\frac{5}{18}$, or $\frac{1}{6}$ of the whole. The Tr. grandfather will therefore take $\frac{5}{9}$, and there is not $\frac{1}{2}$ left for the daughter, but it may reasonably be supposed that she will have the $\frac{1}{3}$ of $\frac{5}{6}$, or $\frac{5}{18}$, which remains. Again, suppose that, with the above-mentioned heirs, there be also a C. sister. The share from *mukásamah* will then be $\frac{1}{2}$ of $\frac{5}{6}$, or $\frac{5}{12}$, which the Tr. grandfather will take as the preferable alternative; and it is presumed that the sister will have the remaining $\frac{5}{12}$, to the exclusion of the C. sister.

No instances are given to show the rights of brothers and sisters, &c., *inter se*, when the Tr. grandfather comes together with a brother *and* a sister, or the like, but it may be reasonably presumed that the usual rules of inheritance should be followed so far as they may be found to apply. Thus, if there be one brother and one sister, it seems reasonable that, the Tr. grandfather having taken his share from *mukásamah*, $\frac{2}{5}$, the brother should take two-thirds of what remains, $\frac{2}{5}$, and the sister one-third of the same, $\frac{1}{5}$. And, upon the same principle, in the case given above of a Tr. grandmother, two brothers, and a sister,* it seems right that, after payment of the Tr. grandmother's $\frac{1}{6}$ and the Tr. grandfather's $\frac{5}{18}$, the brothers should take, each, $\frac{2}{5}$ of what remains, or $\frac{2}{9}$, and the sister $\frac{1}{5}$ of what remains, or $\frac{1}{9}$.

Lastly, it may fairly be gathered, from the exclusion

* *Supra*, 31.

of the sister, as a residuary, in one of the examples given above,* and from the observations introducing and following the case of *acdáriyyah*,† that, when $\frac{1}{6}$ of the whole is found to be the preferable portion for the Tr. grandfather, and that fraction, together with the shares of relations other than brothers, &c., is sufficient to exhaust or more than exhaust the whole estate, no claim of brothers, &c., will be admitted, except in the particular case of *acdáriyyah*, if that case be considered authoritative.

Daughter.—If there be a son or sons as well as a daughter or daughters, the daughters are residuaries instead of sharers, and each daughter takes half as much as each son. Thus, if there be two daughters and two sons, instead of the daughters taking $\frac{2}{3}$ between them, each daughter will take $\frac{1}{6}$ of the residue, and each son $\frac{2}{6}$ or $\frac{1}{3}$.

Son's h. l. s. daughter.—If there be two or more daughters, they take their $\frac{2}{3}$, and there is no share left for the son's daughters; but if there be "in an equal degree with, or lower degree than, them, a boy,"‡ the

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* *Supra*, 31, 32.

† *Supra*, 32, 33.

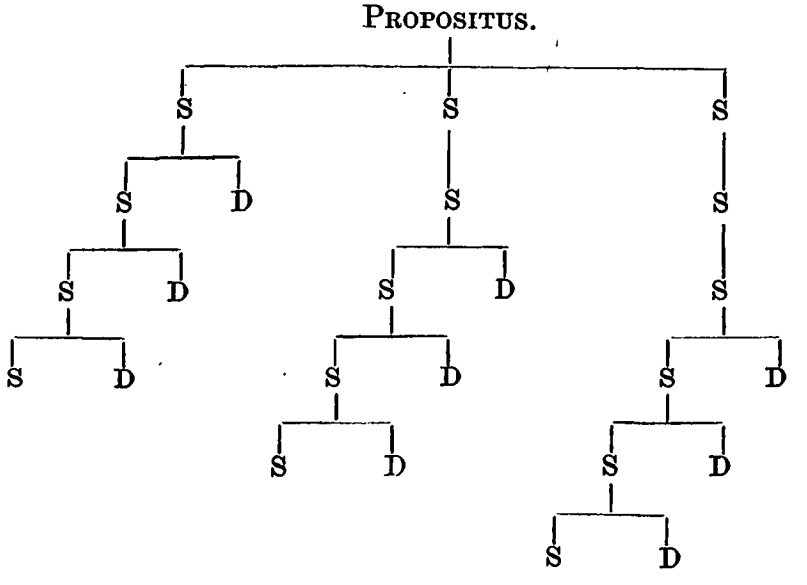
‡ Sir. 5; 8. We copy the exact words, which are rather singular, but will be understood from the illustration which follows. It must, of course, be understood that the "boy" is a son's son h. l. s.; for a daughter's son, or any similar relation, without a complete chain of male relations between him and the deceased, would be a d. k., and could not, therefore, affect the rights of the son's daughters.—Sir. 29; 34, and *vide infra*, 57, &c.

son's daughters become residuaries ; and a similar result follows, *mutatis mutandis*, if, instead of son's daughters with two or more daughters above them, there be son's son's daughters with son's daughters and one daughter above them, so that the first two generations exhaust the $\frac{2}{3}$ together. Each female then takes half as much as the "boy," or male. Thus, if there be two daughters, one actual son's daughter, and one son's son h. l. s., the two daughters take $\frac{2}{3}$, and there is no share left for the son's daughter, but she will take $\frac{1}{3}$ of the residue, or $\frac{1}{9}$, and the son's son will take $\frac{2}{3}$ thereof, or $\frac{2}{9}$; whereas, if there were no son's son, the son's daughter would have nothing, being excluded by the daughters (*inf.* Chap. X.), and the daughters would take the residue by the "return" (*inf.* Chap. VIII.). And, in like manner, a son's son's daughter and a son's son's son h. l. s. will respectively take $\frac{1}{9}$ and $\frac{2}{9}$ when they have son's daughters and one actual daughter above them. There is a curious point about descendants of this kind; that if there be an actual son's daughter and a son's son's daughter, but no daughter, the two survivors stand with respect to each other in precisely the same position as a daughter and an actual son's daughter, that is, the actual son's daughter takes a half, and the son's son's daughter $\frac{1}{6}$. The same rules apply to any lower stage of descent.

These rules, however, will perhaps be better understood from the practical illustrations afforded by what is called in the Sirájiyyah the "case of *tashbíb*."* The

* Sir. 5, 6; 8, 9; Shar. 70.

subjoined figure, taken, with slight variations of detail, from the Sir., presents the case of *tashbíh* to the eye. The letters "S" (son) and "D" (daughter) are used to distinguish the male from the female descendants. The highest line may, therefore, be understood to consist entirely of sons, but the results will be the same, *mutatis mutandis*, if it consists of son's sons h. l. s. In making use of this figure in various hypothetical cases, we assume in each instance that such of the persons comprised in it have predeceased the propositus as we may find convenient for the purposes of our case.



First, let us suppose that the males in the first three generations, and the first two, reckoning from the left, of those in the fourth generation, predeceased the propositus. Then the female in the second generation will take $\frac{1}{2}$, the two females in the third generation will take

$\frac{1}{6}$ between them, and the three females in the fourth generation will be residuaries, each taking half as much as the surviving male in that generation. All in the fifth and sixth generations will be excluded.

Secondly, let us suppose that the males in the first four generations, and one of those in the fifth generation, predeceased the propositus. Then the females in the second and third generations will take as before, and the three females in the fourth generation and two females in the fifth will be residuaries, each taking half as much as the surviving male in the fifth generation. The sixth generation will be excluded.

The reader, with the figure before him, can easily propose other problems to himself, and he will probably have no difficulty in solving them.

The above illustrations show clearly that the rights of these relations may be affected, though not taken away, by the existence of equal or lower son's sons, but that, on the other hand, the presence of higher son's sons, or, *à fortiori*, of sons,* destroys them altogether. If, on the other hand, there be son's sons (not excluded) in the second or third generation in the figure, there is no doubt that the son's daughters in that generation will be residuaries, each female taking, as usual, half as much as each male. The Sir. does not, indeed, mention this in the passage which deals more especially with the rights of son's

* This conclusion as to the exclusion of sons' h. l. s. daughters by sons is fully borne out by an illustrative example in the Shar., showing that a son of Amru, the father of Omar, excludes the daughters of Omar himself.—Shar. 70.

daughters, but in the Chapter on residuaries we find that "the residuaries in another's right are four females; namely, those whose shares are half and two-thirds, and who become residuaries in right of their brothers, as we have before mentioned in their different cases."* Only three of these four females are, in fact, mentioned previously as becoming residuaries in right of their brothers, namely, the daughter, sister, and C. sister; but the fourth must necessarily be the son's daughter, for there is no other person to whom the words "whose shares are half and two-thirds" can apply. It seems clear, therefore, that if there be a son's daughter and son's son in the second generation, and a son's daughter in the third, the persons in the higher generation will be residuaries, and the person in the lower will take nothing; while, if the son's son be in the third instead of the second generation, the higher son's daughter will take $\frac{1}{2}$, and the persons in the lower generation will be residuaries.†

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* Sir. 11; 14.—With regard to the word "brothers" in this passage, it should be remembered that, in the case of sons' daughters, that word must be taken to include sons' sons in the same degree, even if not actually brothers of the sons' daughters; for the case of *tashbíh* clearly shows that all sons' h. l. s. daughters and sons' sons h. l. s., when on the same level, are treated precisely as if they were children of the same individual.

† Since writing these words I find that the Sharífiyyah (in a passage not included in Sir William Jones's abstract) entirely confirms the opinion at which I had arrived.—*Vide* Tag. Lect., 1873, 105, note.

The illustrations in the Sir. relate to cases in which the lower son's daughter is only one generation below the higher, and it may be asked whether, if they be two or more generations removed from one another, and there be no son's son except on a still lower level, the lower son's daughter will still take her $\frac{1}{6}$? This question may be answered, we think, without risk of error, in the affirmative, for the term "son's daughters" in the Sir. applies equally to all stages of descent. It seems clear, therefore, from this alone, that, with a single daughter or higher son's daughter taking $\frac{1}{2}$, a son's daughter at any lower stage of descent will take $\frac{1}{6}$. But again, if we suppose that the son's daughter situated as above described does not take the $\frac{1}{6}$, she must either take nothing, or be a residuary with the son's son on a lower level than herself. The latter supposition seems to be contrary to the spirit of the law, which appears only to contemplate such a result after the whole sons' daughters' share, $\frac{2}{3}$, is exhausted,* and the former supposition is inadmissible, since it would rest on a theory of a residuary taking precedence of a sharer, a theory which would require express precept to support it, while no such precept, in the present instance, appears to exist.

Sister.—When there are brothers, the sisters become

* We have, it is true, submitted above that an *equal* son's son will make a son's daughter, otherwise entitled to the $\frac{1}{6}$, a residuary; but that conclusion, as we have endeavoured to show, is founded upon a higher principle, which is enforced by actual authority.—*Supra*, 40.

residuaries, and each sister takes half as much as each brother.* When there are daughters or son's daughters and no brothers, the sisters take the residue after payment of the daughters or son's daughters' shares.† "Son's daughters" in this place must be taken to mean, as usual, son's h. l. s. daughters. This is evident from the following considerations:—First, this is, in the Sirájiyyah, the accepted sense of the words when there is nothing to indicate the contrary. Secondly, if the word be taken in the more limited sense of daughters of an actual son, the sisters, in the presence, for instance, of son's son's daughters, would either take as sharers, or be wholly excluded. The former alternative seems out of the question, for, as will be seen hereafter, sisters are excluded by son's son's sons,‡ who take simultaneously, as residuaries, with son's son's daughters,§ and the latter

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* Sir. 7; 9, 10.

† Sir. 7; 10.—The words of the Sir. seem clear. "They take the residue, when they are with daughters or with son's daughters"; but it may, perhaps, at first sight, seem doubtful, from other expressions, such as, "Make sisters, with daughters, residuaries" (*ibid.*), whether the sisters take the residue after payment of the daughters' shares, or whether the shares are merged, and the sisters and daughters, &c., become residuaries together. The doubt, however, if any, is set at rest by the illustration in the Shar. mentioned in the text (*infra*, 44). The author regrets that he stated the doctrine on this head erroneously in the "Al Sirájiyyah reprinted," 10, *note*, which the reader is recommended to correct if he possess that work.

‡ *Infra*, Chap. X.

§ *Supra*, 37, &c.

is equally inadmissible, for, as the sisters are residuaries when there are daughters or son's daughters, it cannot be supposed that they are excluded by more distant relations of the same kind. It may, therefore, be concluded that the expression "son's daughters" is to be taken in the general sense above alluded to.

It may perhaps be asked, what is the position of sisters when there are brothers and also daughters or son's daughters? It seems clear that, after payment of the daughters' or son's daughters' shares, the brothers and sisters will, according to the ordinary rule, take the residue, each brother taking a double share, for it would be unreasonable to suppose that the presence of daughters or son's daughters would enable the sisters either to exclude the brothers or to claim equal rights with them. The above conclusion receives support inferentially from the circumstance that a sister who is a residuary with a daughter is stated to be preferred to a *C. brother*,* expressly on account of his being of the half blood, whence it seems clear that she is not preferred to a brother of the whole blood.

Other combinations may be imagined, such as daughter, brother, C. sister; daughter, sister, C. sister; with respect to which a doubt might arise if they were to be considered at the present stage; but with the help of the rules of exclusion,† in addition to the rules above

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* Sir. 10; 13.—An example illustrative of the views expressed above will be found *infra*, Chap. XII., Ex. 6.

† *Infra*, Chap. X.

given, any question of this kind that may arise can be solved, we think, without any real difficulty.

An illustration in the Shar. shows that, as might be expected, if there be a daughter *and* son's daughter, the sister will still take "what remains," the daughter first taking $\frac{1}{2}$ and the son's daughter $\frac{1}{6}$, in accordance with the rules above laid down respecting those relations.*

Consanguine sister.—When there are two or more sisters there is no share left for C. sisters; but if there be also C. brothers by the same father as the C. sisters, in other words, whole brothers of the C. sisters, the C. sisters become residuaries, each C. sister taking half as much as each C. brother.† They also, like sisters, take the residue after payment of daughters' or son's daughters' shares.‡

We may add that a wife or husband, though not technically called a residuary, would appear to be entitled to the residue in addition to his or her prescribed share, when the deceased has left no other heir. (*Mussumat Soobhanee* v. *Bhetun*, 1 S. D. A. 346.)§ And it is

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* Shar. 72.

† Sir. 7; 10, 11.

‡ Sir. 7; 11; and see remarks *supra* on sisters, which apply, *mutatis mutandis*, to C. sisters, their residuary right with daughters or son's daughters being identical with that of sisters.

§ But this principle, although worth recording for further inquiry, remains in some doubt; partly because it really rests only on a single decision of the late Calcutta Sudder, and partly because there is nothing in the report of that decision to show very

stated in the Shar. (but, apparently, only on the authority of Sir W. Jones) that "an equitable practice has prevailed, in modern times, of returning to them" (the husband and wife) "on failure of sharers by blood and of distant kindred," by which must be understood, it is presumed, on failure of sharers, residuaries, and distant kindred.

The male residuaries, or residuaries in their own right, are divided, primarily, into four classes, viz. :—

1. The "offspring" of the deceased, *i.e.* his sons and son's sons h. l. s.

2. The "root" of the deceased, *i.e.* his father and Tr. grandfather h. h. s.

3. The "offspring" of the father of the deceased, *i.e.* brothers and C. brothers and their sons h. l. s.

4. The "offspring" of the immediate Tr. grandfather of the deceased, *i.e.* Pat. and C. Pat. uncles and their sons h. l. s.

These classes, however, which, in most respects, are formed on the same principle, *mutatis mutandis*, with the four classes of the D. K. mentioned later,* do not exhaust the residuaries, for the general definition "every male in whose line of relation to the deceased no female enters,"† includes also the descendants of

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decidedly whether the word "heir" was confined, as in the Sirájiyyah, to the Sh. and Res., or was intended to comprehend the D. K. also.

* *Infra*, Chap. V.

† Sir. 10; 13; and *vide supra*, 25.

the higher Tr. grandfathers; in other words, the Pat. and C. Pat. uncles of the father and Tr. grandfather h. h. s., and the sons h. l. s. of those uncles. This is the clear meaning of the words quoted, and there can be no reasonable doubt that the author of the Sir. understood the definition in this way, for, in illustrating his doctrine as to the whole and half blood, he treats the Pat. uncles and C. Pat. uncles of the "father and grandfather" as residuaries, quite as a matter of course, without deeming it necessary to state expressly that they are so. The sense of the definition is not, therefore, restricted, by the enumeration of classes, to the actual uncles of the deceased, and, this being clear, there is nothing to lead us to suppose that it is limited to anything short of its simple and obvious meaning. Moreover, the analogy of the D. K. might be adduced, if required, in support of this view, for the Sir., after enumerating the classes of the D. K., states that all who are related through them are D. K. also;* and, by analogy, it seems perfectly natural that all who are related through the classes of residuaries in the prescribed manner, *i.e.* entirely through males, must be residuaries also. It may further be observed that, if the more distant relations above mentioned were not residuaries, they would have no assigned place at all, for they are certainly not sharers, nor are they related through any class of the D. K.; and, notwithstanding that the D. K. are also defined as "all relations who

* *Infra*, 58. Sir. 29; 35.

are neither sharers nor residuaries," it would be illogical to include among them persons who are, by an actual definition, placed among residuaries, while they are not, by any precept or reasonable inference, placed within the pale of the D. K. It may, perhaps, not be altogether unimportant to observe further that if, contrary to the words of the definition, the relations in question were held to be D. K., they would offer an exception to an otherwise universal experience, for all the admitted D. K. are related to the deceased through at least one intermediate female. Lastly, it may be observed that the classes of residuaries and of the D. K. are, in the main (as shown hereafter),* complementary to one another, and that no one who has examined and understood the common principle on which they are constructed can reasonably suppose, without express authority (and such authority does not exist), that the one are intended to be exhaustive when it is well known that the other are not.†

It may, perhaps, be as well to mention that Mr. Baillie and Shama Churun Sircar have both come to the same conclusion with ourselves on this point. Mr. Baillie enters into the subject at great length, and combats Mr. Macnaghten's error in excluding great uncles, &c.,‡ by endeavouring to show that the translator of

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* *Vide infra*, 59–63.

† *Vide infra*, 58, &c.

‡ *Vide supra*, 25, note.

the Sirájiyyah is wrong in using the words "*nearest* grandfather" in the description of the fourth class of residuaries at Sir. 10; 13. We do not think that he succeeds altogether in proving this,* but, on the other hand, we cannot consider the point to be at all material. Nothing would be gained by striking out the word "nearest," for, whether it is correctly used or not, it seems quite certain that the nearest, or immediate, Tr. grandfather is really meant. The word "grandfather" alone might, of course, bear the meaning of grandfather h. h. s., but, a few lines lower in the same page, we find, as a more detailed description of the same class, the words "the offspring of his grandfather, or his uncles." Now the word "uncle" is *never* used in the Sirájiyyah otherwise than in its literal sense, and it therefore appears clear that the word "grandfather" is here used in its literal sense also; that is, in the sense of an immediate or "nearest" grandfather. But, as we have endeavoured to show, the author of the Sir. is here only defining certain "classes"; and the error of Mr. Macnaghten arose from his hastily concluding that the classes were exhaustive. It is worthy of notice that he makes precisely the same mistake as to the D. K.† The analogy between the two is interesting and worthy of

* It is rather singular that Shama Churun Sircar, while adopting Mr. Baillie's condemnation of Sir W. Jones, differs from him as to the actual meaning of the passage. It seems quite possible, therefore, that Sir W. Jones may be right after all.

† *Vide* Macn. Prin., 158, 159.

observation. In the case of the residuaries the Sir. gives the definition, "Every male," &c.; and then follows the enumeration of classes, which, if exhaustive, would cut down that definition so as to exclude great uncles, &c.; and, similarly, in the case of the D. K., there is the definition "All relations who are neither sharers nor residuaries,"* which would be similarly cut down if the classes of the D. K. were exhaustive. In both cases Mr. Macnaghten treats the classes as being co-extensive with the whole body, and it is in this, and not in laying stress on the word "nearest," that he seems to us to have erred. But while we thus differ from Mr. Baillie as to some portion of his arguments, we are entirely at one with him as to the doctrine contended for, *i.e.* that the sons h. l. s. of the father's father h. h. s. are among the residuaries; and we cordially acknowledge the service which he has rendered in labouring to enforce it. It may be added that Mr. Baillie and Shama Churun Sircar give, in support of this view, references to the Koodooree, the Fatáwa Sirájiyyah, and the Fatáwa Alamgíri, which are so far useful that they place the father's father's brothers, or great uncles, and their sons h. l. s., among residuaries; but it has been shown above that the Sirájiyyah itself stops little, if at all, short of this. Those who may desire to read Mr. Baillie's and Shama Churun Sircar's remarks on this important subject will find them at Bail. M. L. I. 44—50; Tag. Lect. 1873, 129, &c.

* *Vide supra*, 12; *infra*, Chap. V.; Sir. 28; 33, &c.

As to the rights of male residuaries among themselves, it is laid down in the Sir. that proximity of degree is the test of preference of one person to another;* but that, as between individuals of different classes, the order of the classes is the test of proximity.† An exception, however, must be considered to occur to the latter branch of this rule if the doctrine which admits the brother to inherit with the Tr. grandfather be admitted.‡

There is no necessity to lay down any rule as to the order of female residuaries *inter se* in respect of degrees of relationship, for those of them who inherit together with males come in, of course, in the same places as those males respectively; and the sisters or C. sisters, who are residuaries when there are daughters or son's daughters, come in, similarly, when there are relations of one of the kinds specified.

Subject to the question of degree, the "strength of blood" or "strength of consanguinity" prevails, by which is meant that one who is a relation of the whole blood, or descended from such a relation, is preferred to one who is related by the half blood, or descended from one so related.§ Thus a brother is preferred to a C.

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* Sir. 10; 13.

† *Ibid.* 30; 35.

‡ *Vide supra*, 29; and *infra*, Chap. X.

§. "He who has two relations is preferable to him who has only one relation, whether it be male or female, according to the saying of Him on whom be peace! 'Surely, kinsmen by the same father and mother shall inherit before kinsmen of the same father only.'" —Sir. 10; 13.

brother, a brother's son to a C. brother's son, a Pat. uncle, father's Pat. uncle, or father's father's Pat. uncle to the corresponding C. relations respectively. This rule takes effect irrespective of the sexes of the claimants, so that, for instance, a sister who becomes a residuary by the presence of a daughter is preferred to a C. brother.* It will be observed that all the instances above given have reference to C. relations or persons related through them; but the reader will doubtless remember that no U. relations or descendants of U. relations can be residuaries; so that it is not necessary, in this place, to consider the question whether the preference of whole to half blood is to be considered as extending to the mother's side.

Although, as seen above, the test of proximity of degree, as between members of different classes, must be decided by the order of the classes, a question may arise, what rule should be followed if there are claimants in different lines, either some within and some without, or all without, the limits of the classes; as, for instance, if there should be two descendants of two distant Tr. grandfathers, one such descendant being in a nearer line, but the other being more nearly related in actual number of steps; or, if there should be two such descendants, one in a nearer line, but each removed from the deceased by exactly the same number of steps. By analogy, it would seem that, in either case, the person in the nearer line must succeed, to the exclusion of the

* *Ibid.*, and *vide supra*, 42, 44.

other. If the composition of the several classes be examined, it will be seen that, so far as they go, they are constructed on the principle that a nearer line succeeds in preference to a more remote. First, we have the line of the deceased; then (after the interposition of the ascendants) the line of his father; then the line of his father's father; and it is shown that the second of these cannot succeed till the first is exhausted, nor the third till the first and second are both exhausted. It is reasonable to conclude, in the absence of any statement to the contrary, that the same principle holds with respect to all lines at whatever distances, so that, for instance, all residuaries descended from the father's father's father must be exhausted before any residuary descended from the father's father's father's father can succeed.

It may be remarked that the difference of classes in the case of residuaries is much more cursorily dealt with by the author of the Sir. than in the case of the D. K. That it is a substantial and important difference, however, is clear from what has been written above, and from the passages of the Sir. that have been referred to. Less stress is laid upon it, probably for the reason that in most ordinary cases there are express and well-known precepts which cause any reference to the general principle to be unnecessary. Thus it is known by express precept that a son prevents a father from taking as residuary*; and, similarly, it is known that a father entirely excludes a brother.† But cases which

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* *Vide supra*, 26, 27. † *Vide infra*, Chap. X.

arise in actual practice are not always ordinary cases, and circumstances may well occur which may render it necessary, in the absence of any special precept, to rely on the broad principle which gives the succession to the several classes in the order of their enumeration.

The residue is divided equally among residuaries in the same degree and of the same sex; but, if they differ in sex, each male takes twice as much as each female.* Thus, if the residuaries are three brothers' sons, each will take $\frac{1}{3}$ of the residue, whether all are sons of the same brother, all sons of different brothers, or two of them sons of one brother and one of another. And, if the residuaries are two sons and three daughters, each son will take $\frac{2}{7}$, and each daughter $\frac{1}{7}$.

If the residuaries are two sons (or, it may be presumed, any two male relations equal in degree), and one of them acknowledge that half of a debt of one hundred *dirms* which was owing to the deceased's estate was paid in his lifetime, and the other deny that such payment was made, the former will not be entitled to any part of the debt, but the latter will be entitled to receive fifty *dirms* from the debtor.† And, on the same principle

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* The equal division is shown, as in the case of sharers, by the absence of any direction to the contrary, and by the rule for ascertaining the share of each individual in a class.—Sir. 19; 24; *supra*, 21, note. The respective rights of the sexes are shown in the earlier portions of this chapter, in dealing with the circumstances under which females and males become residuaries together.

† Hed. xxv. iii., "Section," 6.

(viz. that an acknowledgment operates upon a man's own rights, though not upon those of others), if there be only one son, and he acknowledge a stranger to be his brother, the stranger will share the inheritance with him, though the parentage will not be established.*

It will be well to remember that the rule by which certain females become residuaries in the presence of an equal male residuary is not universal, but applies only to cases in which, as above mentioned, such females are primarily sharers. Thus, for instance, a Pat. aunt, who is not a sharer, does not become a residuary in the presence of a Pat. uncle, although the latter is a residuary.† But a son's daughter, as we have seen, may become a residuary by the presence of a son's son, although deprived of a share by the presence of daughters, &c., for she was originally and normally a sharer.

It is obvious that a person cannot be a residuary through more than one chain of connection with the deceased. The questions, therefore, which arise from a double connection in the case of some sharers and D. K. cannot arise in the case of residuaries.

In all instances in which a person is said to become a residuary by the presence of others (*e.g.* sisters by

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* Hed. xxv. iii., "Section," 5.

† Sir. 11; 14. It will be seen hereafter that a Pat. aunt is one of the D. K, *vide infra*, Chap. V.

the presence of brothers), the presence of one such person will equally make them residuaries.*

* The Sharífiyyah, in a passage not translated by Sir William Jones, states this expressly with respect to sisters and daughters (*vide* Tag. Lect., 1873, 106); and the reader will find by his own observation that the principle holds generally,

CHAPTER V.

OF DISTANT KINDRED.

It has already been stated that the distant kindred divide the property among them when there are no sharers or residuaries.* The mere absence of residuaries would not be sufficient to cause the admission of D. K., for, although the shares might not exhaust the property, the residue would be divided among the sharers (exclusive of the husband and wife, if any) by the doctrine of the "return."† In such case, therefore, there would be nothing left for the D. K. When, however, the D. K. succeed, in consequence of the absence of sharers and residuaries, they are admitted according to the order of their classes (*infra*). Thus,

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* For definition of D. K., see p. 12.

† *Infra*, Chap. VIII.

if there be any D. K. of the first class, those of the second class have no claim, and so on with the rest. This rule is so rigidly followed, that a person of the third class, for instance, can have no portion of the inheritance, even though he be nearer to the deceased in the actual number of steps than those of the first and second class who may be living.*

The D. K. are primarily divided into four classes, which are as follows:—

1. Persons descended from the deceased h. l. s.; *i.e.* descendants of daughters or of other female descendants h. l. s. of the deceased.†

2. Those from whom the deceased is descended, h. h. s.; *i.e.* false grandparents.‡

3. Those descended from the parents of the deceased, h. l. s.; *i.e.* sisters', C. and U. sisters', and U. brothers',

* These are the opinions of the author of the Sir. He records, indeed, several conflicting views, namely, that of Zaid the son of Thabit and others, that the D. K. have no rights, but that the surplus goes to the public treasury (Sir. 28, 29; 34); that of Abu Sulaiman and others, that the second class comes first (Sir. 29; 35); and that of Abu Yusuf and Muhammed, that the third class comes before the maternal grandfather (Sir. 30; 35). To these opinions, however, he seems to attach no practical value.

† "The daughters' children, and the children of the sons' daughters" (Sir. 29; 34). But it is shown by the illustrations in the chapter on Class 1 (Sir. 30; 35), that this means children h. l. s.; in other words, descendants generally, other than those who are sharers or residuaries. And it will be remembered that the expression "sons' daughters" means "sons' h. l. s. daughters," *vide supra*, 41.

‡ Or, as it is expressed in the Sir., "the excluded grandfathers and the excluded grandmothers."—Sir. 29; 34.

children; brothers' and C. brothers' daughters and sons' h.l.s. daughters; and their descendants.*

4. The children of the two grandfathers and two grandmothers of the deceased;† *i.e.* Pat. aunts, U. Pat. uncles, Mat. uncles and aunts, and C. and U. Pat. aunts and Mat. uncles and aunts.

It must be remembered, however, that not only persons actually enumerated in the classes, but all who are related to the deceased through them, are among the D. K.‡ Thus, numerous degrees of cousins are D. K. as being related through classes 2 and 4, and great uncles not related entirely through males are D. K., as being related through class 2. And it must also be remembered that all relations are D. K. who are not sharers or residuaries; § thus, cousins who are children of residuaries but are not residuaries themselves (*e.g.* Pat. uncles' daughters) are D. K., though not members of any class or related through any member of a class. It will readily be seen that, if such persons were not D.K., the rules giving a preference to "chil-

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* Some of these are not mentioned in the actual definition of the class (Sir. 29; 34); but the illustrations in the chapter on Class 3 (Sir. 36; 42) show that they are included.

† Sir. 29; 34. The expression, *two* grandfathers and *two* grandmothers, is peculiar, and is not met with elsewhere in the Sir. The fourth class includes, as the reader will readily perceive, such children of the immediate grandparents as are not sharers or residuaries.

‡ Sir. 29; 35.

§ *Vide supra*, 12.

dren of heirs" and "children of residuaries" (see later in this chapter) would be unmeaning.

It will readily be seen from the above (as remarked *supra*, 12, 13, note), that a D. K. is not *necessarily* more remote than a sharer or a residuary. Thus a daughter's son is a d. k. (*vide supra*, 57), though nearer than the mother's mother's mother, who is a sharer, or a father's father's Pat. uncle, who is a residuary.

It may be observed that (with one exception, not of principle, but merely of method, which will be mentioned below) the classes of D. K. are, severally, complementary to the corresponding classes of residuaries.* Between them, they exhaust, within their respective limits, all relations who are not sharers. Thus the first class of residuaries, it will be remembered, consists of sons and sons' sons h. l. s.; and the first class of D. K. takes in all other descendants, except daughters and son's h. l. s. daughters, who are sharers. The second class of residuaries consists of the father and Tr. grandfather h. h. s., while the second class of D. K. takes in all other ancestors, except the mother and Tr. grandmothers, who are sharers. The third class of residuaries consists of brothers and C. brothers, and their sons h. l. s., while the third class of D. K. takes in all other descendants of the parents except sisters, C. sisters, and U. brothers and sisters, who are sharers. Lastly, the fourth class of

* For classes of residuaries, *vide supra*, 45.

residuaries consists of the sons h. l. s. of the Tr. grandfather, *i.e.* the Pat. and C. Pat. uncles and their sons h. l. s.; and the fourth class of D. K., together with the descendants of the fourth classes of residuaries and D. K.,* takes in all other descendants of immediate grandparents. The exception above alluded to is found, it will be perceived, in the fourth class; for that class, among residuaries, takes in persons h. l. s. in descent from the ancestors, while, in the D. K., it takes in only immediate sons and daughters of the ancestors, the more remote descendants being ranged in a separate category. This departure from the original method is made, no doubt, for reasons of convenience; for it will be found that, from the nature of things, a different set of rules is necessary to regulate the succession of the lower descendants; and it is, no doubt, on that account that they are not included in the class. The variation is merely of a formal character, and in no way affects the principle on which the classes of residuaries and D. K. are respectively constructed.

Pursuing the parallel beyond the limits above described, we shall see that the D. K. are still complementary to the residuaries. Residuaries are, generally, all males related entirely through males; † and D. K.

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* It will be remembered that a person may be descended from a residuary without being a residuary; *e.g.* a Pat. uncle's son is a residuary, but a Pat. uncle's son's daughter and all her descendants are D. K.

† *Supra*, 25.

are, generally, all relations other than sharers and residuaries.* A very slight examination of the Table of Sharers will show that in commencing beyond the above-mentioned limits we are commencing beyond the range within which sharers may be found. Consequently, while the remaining residuaries will be all other males related entirely through males, the remaining D. K. will be all other females, and all other males related otherwise than entirely through males; in other words, the remaining residuaries and D. K. are complementary to one another, exhausting together all other relations of the deceased *ad infinitum*.

This harmonious and scientific result, showing that, notwithstanding its minute attention to particular degrees of relationship, the law, in its broad preliminary definitions, recognises all relations, however remote, as possible inheritors, is of the utmost importance, and should not on any account be forgotten. It is only by upsetting and disproving the definitions in question that any doctrine of limitation can be arrived at; and no attempt to do this has, as far as we are aware, ever been seriously made. The errors which have been made in limiting the residuaries and D. K. have been the result, apparently, not of intentional opposition to the general definitions, but of passing them over unobserved, and substituting particular enumerations which were meant for a different purpose. These enumerations are the classes; and while there is no sort of authority for main-

* *Supra*, 12.

taining that they are exhaustive, there are distinct and positive statements of law which are entirely inconsistent with their being so. We have endeavoured to emphasize this doctrine in previous passages,* but the above concise view of the scheme of Moohummudan inheritance puts, as it were, a key-stone to the work, and has been deferred to this point merely because the reader, until informed as to the various divisions of the D. K., would not have been in a position to appreciate its bearing on the principles which we seek to inculcate.

The above considerations suggest a convenient and exhaustive classification of relations who may be inheritors in five divisions based upon the principle of the classes, which may be useful as an aid to memory. It will be found that the inheritors, thus enumerated, include all relations of the deceased, however remote. Should the reader avail himself of this classification in practice, he must not forget that the husband and wife are sharers (though not mentioned here, as not being relations); and he must observe that, among the "Ancestors" of the propositus, the father and Tr. grandfather occur twice over, being necessarily included both as sharers and as residuaries. The following is the suggested classification:—

1. DESCENDANTS.
   Sharers: daughter, son's h. l. s. daughter.
   Residuaries, Class 1: son h. l. s.
   D. K., Class 1: all other descendants.

* *Vide supra*, 45, &c.

2. ANCESTORS.

Sharers: father, Tr. grandfather, mother, Tr. grandmother.

Residuaries, Class 2: father, Tr. grandfather.

D. K., Class 2: all other ancestors.

3. DESCENDANTS OF PARENTS.

Sharers: sister, C. sister, U. brother, U. sister.

Residuaries, Class 3: brother and his son h. l. s., C. brother and his son h. l. s.

D. K., Class 3: all other descendants of parents.

4. DESCENDANTS OF IMMEDIATE GRANDPARENTS (except those included in previous divisions).

Sharers: none.

Residuaries, Class 4: Pat. uncle and his son h. l. s., C. Pat. uncle and his son h. l. s.

D. K., Class 4, and descendants of Classes 4 of residuaries and D. K.: all other descendants of immediate grandparents (except as above excepted).

5. DESCENDANTS OF REMOTER GRANDPARENTS (except those included in previous divisions).

Sharers: none.

Residuaries, beyond the limits of Class 4: Pat. and C. Pat. uncles of father and father's father h. h. s., and their sons h. l. s.

D. K., beyond the limits of the descendants of Classes 4 of residuaries and D. K.: all other descendants of remoter grandparents (except as above excepted).

Within the limits of each particular class (except the fourth, or avuncular, class, in which there cannot, of course, be a difference of degree), it is a general rule that a person nearer in degree succeeds in preference to one more remote.* Thus, a daughter's daughter is preferred to a son's daughter's daughter;† and, in all classes, if there be several of an equal degree, the property (subject to special rules mentioned hereafter) goes equally among them if they are of the same sex. If they are of different sexes, *primâ facie* each male takes a double portion. There is, however, some disagreement as to cases in which persons through whom they are related to the deceased are of different sexes or of different blood;‡ and it is maintained by Muhammed that regard must be had partly to the "roots" or intermediate relations, and not solely to the "branches," or actual claimants. Thus all are agreed that if a man leave a daughter's son and a daughter's daughter, the male will have a double portion, for there is no difference of sex in the intermediate relations; but if there be a daughter's son's daughter and a daughter's daughter's son, it is said by Abu Yusuf that the male will have a double portion, on account of his sex, but, by Muhammed, that the female, instead of the male, will take the double portion, by reason of her father's sex.§ And, on

* Sir. 30, 35, 36; 35, 41, 42, &c.

† Sir. 30; 35.

‡ By difference of blood (or difference of consanguinity) is meant the difference between whole blood and half blood.

§ Sir. 31; 37, &c.

the other hand, all are agreed that if there be two daughters of different brothers, they will take equally between them; but if there be a daughter of a brother and a daughter of a C. brother, Muhammed rules that the latter will take nothing; for, having regard to the circumstance that a brother excludes a C. brother, he considers that there is nothing to be handed down to the descendant of the latter, and that the whole will go to the descendant of the former. The opinions of Muhammed are disputed by Abu Yusuf, who maintains that, in Classes 1 and 3, and among the descendants of Class 4, the sexes of the actual claimants should be considered; and that questions of "blood" should be decided according to certain rules, which his rejection of Muhammed's principles renders necessary*; but the doctrine of Abu Yusuf does not seem to be generally accepted, and that of Muhammed is certainly favoured by the author of the Sir., and apparently by the author of the Shar.†

The rule of Abu Yusuf as to the sexes requires no further explanation, and it is only necessary to caution the reader, when applying it, to take into consideration the special rules as to blood which have just been alluded to and which will be given later.

The rule of Muhammed, on the other hand, while

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* These rules are given *infra*, in dealing with particular classes, &c.

† Sir. 33; 39; &c.; Shar. 95.

resting to a large extent on the principle of representation, which, by itself, would be simple enough, involves a number of other considerations of a more complex character, varying with the circumstances of the cases, and too novel and important to be passed over without more lengthened explanation. The rule in question is treated by the author of the Sir. as it arises in one class after another; but it will be more intelligible to the reader if it be stated in a general form, divided, nevertheless, into branches, according to the circumstances that may arise. The following appears to be a correct representation of this very singular method:—

First branch.—As regards "blood," the persons in the first line,* and, as regards sex, those in the first line in which the sexes differ, are treated, primarily (with a modification given below†), as entitled to the rights that they would have had if living.

Thus, if there be descendants of a daughter's son and of a daughter's daughter, the daughter's son is primarily entitled to $\frac{2}{3}$, and the daughter's daughter to $\frac{1}{3}$‡; if there be descendants of a U. brother and of a U. sister, the U. brother and U. sister are primarily entitled each to $\frac{1}{2}$§; if there be descendants of a brother and sister,

* The difference of blood can, of course, actually arise only in the first line, and it is consistent with Muhammed's general principle to take account of it where it arises.

† *Vide* "Sixth branch," *infra*, 69.

‡ Sir. 31; 37.

§ Sir. 36; 42. In addition to their share, $\frac{1}{3}$, they would, if living, have taken the rest by the return.—*Vide infra*, Chap. VIII.

and of corresponding C. and U. relations, the U. brother and sister will primarily take $\frac{1}{3}$, the C. brother and sister are excluded by the brother, and the brother and sister will primarily take the remaining $\frac{2}{3}$ as residuaries, the male taking a double share*; if there be a sister's daughter's daughter and a C. brother's daughter's son, the sister will be primarily entitled to $\frac{1}{2}$ as her natural share, and the C. brother to $\frac{1}{2}$ as a residuary†; and if there be descendants of a C. Pat. uncle and of two C. Pat. aunts, the C. Pat. uncle will primarily be entitled to $\frac{1}{2}$, and the C. Pat. aunts each to $\frac{1}{4}$.‡

Second branch.—If any person in a higher line than that of the actual claimants has two or more descendants among the claimants, such person counts as two or more similar persons in his own line.

Thus, if the daughter's son above-mentioned have two descendants among the claimants, he will count as two males, and if there be, with him, two daughter's daughters, one of whom has two such descendants, and the other only one, the former will count as two females; so that the daughter's son is deemed to be entitled to $\frac{4}{7}$, and the daughter's daughter in question to $\frac{2}{7}$, while the other's daughter's daughter is only entitled to $\frac{1}{7}$.§ Similarly, if the U. sister above-mentioned has two de-

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* *Vide infra*, Chap. VII., Ex. 4.

† Sir. 37; 43.

‡ Shar. 98, 99, and *infra*, Chap. VII., Ex. 7; and *vide infra*, "Sixth branch."

§ Sir. 32, 33; 38, 39; and *vide infra*, Chap. VII., Ex. 2.

scendants among the claimants, she will be entitled to $\frac{2}{3}$, and the U. brother only to $\frac{1}{3}$*; and, if there is only one sister together with a C. brother, but that sister has two descendants among the claimants, she will count as two sisters and be entitled to $\frac{2}{3}$.†

Third branch.—If there be only one male or only one female in the first line in which the sexes differ, his or her portion, thus ascertained, descends without increase or diminution to his or her own posterity; but, if there be more than one of either sex, they are to be treated as a group, and their aggregate portions are divisible (with an exception given below‡) among their own descendants in the next generation, according to the usual rule of a double portion to the male.

Thus, the $\frac{4}{7}$ of the daughter's son above-mentioned will go, unchanged, to his posterity; but, supposing the daughter's daughter with $\frac{2}{7}$ to have a daughter, and the daughter's daughter with $\frac{1}{7}$ to have a son, the daughter's daughter's son will count as two females, so that he will divide the whole $\frac{3}{7}$ equally with the daughter's daughter's daughter, who, as representing her mother (or, as having herself two descendants among the claimants), counts as two females also. Each, therefore, will be entitled to $\frac{1}{2}$ of $\frac{3}{7}$, or $\frac{3}{14}$.§

Fourth branch.—The course indicated in the "third

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* *Vide infra*, Chap. VII., Ex. 4.
† *Vide infra*, Chap. VII., Ex. 5.
‡ *Vide* "Fifth branch," *infra*, 69.
§ *Vide infra*, Chap. VII., Ex. 2.

branch," as to the first line in which the sexes differ, is to be followed equally in any lower line; but the descendants of any individual or group once separated must be kept separate throughout; in other words, they must not be united in a group with those of any other individual or group.

Fifth branch (exception to "third branch").—In the case of descendants of U. relations the rule of a double share to a male is not followed.

Thus, if the U. sister above-mentioned have a son and a daughter, they will take equally,* whereas, if their parent were a sister or C. sister, the male would take a double share.†

Sixth branch (modification of "first branch").—In dealing with the descendants of Classes 4 of residuaries and D. K., where there is a male residuary in the first line in which the sexes differ, he is not considered to have excluded the females, although they are D. K., but is deemed, for the purpose of applying the rule, to have taken a double share as a male.

Thus, if there be a C. Pat. uncle and two C. Pat. aunts, although the former would exclude the latter if they were all living,‡ the former, for the purpose

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* This rule is in analogy with the rule which gives equal portions to a U. brother and a U. sister.—*Vide supra*, 18, note.

† Sir. 38; 43, 44; and *vide infra*, Chap. VII., Ex. 4.

‡ It will be remembered that he would not make them residuaries, as they are not primarily sharers.—*Vide supra*, 54. It may be presumed that this branch of the rule extends to any other kind of D. K. to which it can be applied, *e.g.* to the descendants of a brother's son and brother's daughter.

of calculating the portions of the D. K. descendants, will be considered to have taken $\frac{1}{2}$, and the latter $\frac{1}{4}$ each.*

The rule, as thus stated, will, it is hoped, enable the reader to work out, according to Muhammed's method, any examples that may occur. It must be remembered, of course, that the other rules and principles stated in this chapter and elsewhere are to be carefully followed as to all points for which the rule of Muhammed does not specially provide. Thus, if two of the actual claimants be children of the same person, and of the same sex, they will take the hypothetical portion of that person equally between them; and if they are of different sexes (except in the case of descendants of U. relations), the male will take a double share. Thus, too, if a claimant is related to the deceased in two ways, both relationships are to be taken into account†; and thus, also, the general rule of proximity, &c. must be followed, and the special rules of the particular classes‡ must be considered to apply, except when they are, from their nature, exclusively applicable to the doctrine of Abu Yusuf.

We shall have to recur to the rule of Muhammed from time to time; but we now proceed with the general treatment of our subject.

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* *Vide* example, of which the result is given at Shar. 98, 99, and which is worked out *infra*, Chap. VII., Ex. 7.

† *Vide infra*, 71.

‡ *Vide infra*, 71, &c.

A person who is related to the deceased as a d. k. in two ways is entitled to succeed in both. Thus, if a daughter's son marry a daughter's daughter, and they have two female children, and then die before the propositus, the two female children will be entitled to succeed both as daughter's son's daughters and as daughter's daughter's daughters.

The following special rules are laid down with respect to particular classes:—

In Class 1, a child of an heir (*i.e.* of a sharer or a residuary*) is preferred to a child of a d. k. when the degrees of relationship are the same; thus, a son's daughter's daughter succeeds in preference to a daughter's daughter's son, the former being a child of a sharer, while the latter is the child of a d. k.

In Class 2, a person related through an heir is preferred to a person not so related, the degrees being the same.† The author of the Sir. does not give any example to illustrate the meaning of the words "related through an heir"; and, strictly speaking, all persons of this class must be so related, since all must be related through the father or mother. But, judging from the analogy of Class 1, in which a child of an heir, who is there preferred, is necessarily a person related to the deceased entirely through heirs, we may conclude that

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* *Vide supra*, 11.

† The author of the Sir. seems, at least, to incline to this view, though he gives authorities both for and against it.

by "related through an heir" is meant related entirely through heirs, or, in other words, not related through a d. k. Thus, the father's mother's father may be considered to be "related through an heir," and consequently to be preferred to the mother's father's father, whose chain of relationship with the deceased includes a false grandfather, or d. k. of Class 2.

When there is no difference of degree in this class, and all or none are "related through an heir," $\frac{2}{3}$ go to the father's side, "that being the share of the father," and $\frac{1}{3}$ to the mother's side, "that being the share of the mother." The distribution is then made on each side in the same manner in which, if there were only one side, the distribution would be made on that side.* With respect to this class there is a passage in the Shar.† which will be found interesting, as showing, by a very clear enumeration, the order in which the different tests of distinction are to be applied. It may be observed that, in the passage in question, the word "sharer" is used instead of "heir," the fact being that in the second class any intermediate relative who is an heir must, it will easily be seen, be either the father, the mother, or a true grandparent, all of whom are sharers, though the father and true grandfather may also be residuaries. It may be remarked that the passage alluded to is defective, in merely stating how the property is to be distributed when the claimants are all on the same side. It has

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* Sir. 35; 41. † Shar. 95.

been seen, however, above, that the principle is the same when there are claimants on both sides, only that the different sides are treated separately, one side taking two-thirds, and the other one-third, among them.

The reader will do well to remember that, in respect of this class, the doctrine of Muhammed is not disputed.

In Class 3, subject to the preference of a nearer in degree, the child of a residuary* is preferred to the child of a D. K. Thus, a brother's son's daughter succeeds in preference to a sister's daughter's son, and a C. brother's son's daughter in preference to a C. sister's daughter's son, or even a sister's daughter's son.† When the degrees are equal, and when all or none of the claimants are children of residuaries, or some are

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* In the earlier classes, a child of an "heir," or a person related through an "heir," is stated to be preferred to a child of, or a person related through, a d. k. A little observation will enable the reader to ascertain that, in Class 3, a child of a sharer must always be nearer in degree than any child of a d. k., so that the two can never come into competition, and the word "residuary" is, therefore, sufficient here.

† The words in the Sir. from which the last illustration is taken may perhaps be considered a little obscure; they are, "the daughter of a brother's son and the son of a sister's daughter . . . . one of them by the same father and mother, and the other by the same father only," and it might, in the absence of further information, be thought that "one of them" refers exclusively to the former, and "the other" to the latter. But the circumstance, that the question of blood does not arise as between a child of a residuary and a child of a d. k. (as will be seen *infra*), shows conclusively that the construction adopted in the text is correct.

children of residuaries and some children of sharers,* descendants of whole blood relations, according to Abu Yusuf, are preferred to those of C. relations; thus, a sister's daughter's daughter is preferred to a C. brother's daughter's son (neither being a child of a residuary), and a brother's son's daughter to a C. brother's son's daughter (both being children of residuaries). And it would further appear that, according to the views of the same lawyer, the descendants of the whole blood and of C. relations are preferred to the descendants of U. relations.† It must be remembered that Muhammed's doctrine is totally different, as he takes account of the difference of blood in the first line, so that there is no necessity for any rule as to the descendants.

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* Sir. 36; 42. In other words, when the preference of the child of a residuary to the child of a d. k. cannot come into play. It will be remembered that, in this class, children of a sharer and children of a d. k. (and, consequently, children of all three sorts) cannot be equal in degree; the distinction of blood is therefore operative when all are children of sharers, all children of residuaries, all children of D. K., or some children of residuaries and some of sharers, an enumeration which, (taking into account what has been said as to children of sharers and children of D. K.), is identical with that in the text.

† This is not actually stated in the Sir., but it appears from examples in the Sir. and Shar., which are given in a later chapter —*vide infra*, Chap. VII., Examples 4, 5. It will be seen that this is quite in analogy with the rule expressly stated as to Class 4— *vide infra*, 76. It is stated, indeed, in the Shar. (*vide* Shar. 96) that the descendants of U. relations are not excluded; but this is evidently a mistake of the translator, who has amended the passage in one of his "corrections" inserted between the "Commentary" and the original text.

When descendants of U. relations are entitled to succeed, Abu Yusuf treats them as entitled, *inter se*, precisely in the same way as any other claimants. Muhammed, it will be readily perceived, is compelled, in consistency with his general principle as to "roots," to adopt a different course. Thus, if there be a U. brother's son's daughter and a U. sister's daughter's son, Abu Yusuf gives a double share to the male claimant; but Muhammed divides the property equally between the two, because the U. brother and sister, if living, would have taken equal portions.*

In Class 4 there cannot, of course, be any difference of degree, since the class consists entirely of actual children of immediate grandparents. There is no preference given to the child of an heir or to the child of a residuary. Thus, a C. Mat. aunt is preferred to a U. Mat. aunt (in consequence of the preference of C. to U. relations, *infra*, 76), notwithstanding that the former is the child of a d. k., and the latter the child of an heir.† The primary rule is, that $\frac{2}{3}$ go to the father's side, "for they are the father's allotment," and $\frac{1}{3}$ to the mother's side, "for that is the mother's allot-

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* Sir. 36; 42. It will be remembered that a U. brother and sister (unlike a brother and sister, or C. brother and sister) take in equal portions. Sir W. Jones, in his "Corrections," inserted between the "Commentary" and the original text of the Sir., states the doctrine of unequal division generally, without, apparently, having perceived that Muhammed dissents from it.

† Sir. 41; 46.

ment." Thus, if there be a Pat. aunt and a U. Mat. aunt, or a U. Pat. aunt and a Mat. aunt, in either case the Pat. relation will take $\frac{2}{3}$ and the Mat. relation $\frac{1}{3}$, irrespective of the difference of whole and half blood, and irrespective of the sexes of the claimants.* So powerful is this rule, that the same result will follow, instead of one claimant excluding the other, even if there be a Pat. aunt. and a C. Mat. aunt, though the former is the child of an heir on both sides, and is also of the whole blood, while the latter is only the child of a d. k. and is related by the half blood.† But, among claimants on the same side, the whole blood is preferred to the half blood, and C. relations are preferred to U. relations, irrespective of the sexes of the claimants. Subject to the above rules, the claimants, when all are on one side, take the whole among them in the usual manner, each male taking a double share; and when there are claimants on both sides, each side divides its own fraction, $\frac{2}{3}$ or $\frac{1}{3}$ as the case may be, according to the same principles.

The Sir., as we have seen, limits Class 4 of the D. K. to the actual children of the immediate grandparents, thus departing from the analogy of the residuaries, among whom remoter descendants are also included in Class 4.‡ Hence the necessity of a further chapter on

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* The Sir. does not expressly mention the sexes of the claimants in this place; but *vide* Shar. 96, 97; and *vide infra*, Chap. VII., Ex. 6.

† Sir. 41; 47.

‡ *Vide supra*, 45, 58.

the D. K., which purports to treat of the "children" of Class 4, but which has really a far wider scope, as it treats, in fact, of remoter descendants as well as of children,* and of descendants of Class 4 of the residuaries as well as of descendants of Class 4 of the D. K.† In short, the chapter in question treats of all first cousins and descendants of first cousins other than those who are residuaries, or, in other words, all descendants of Classes 4 of residuaries and D. K. It must be remembered, therefore, whenever allusion is made in the Sir. to the children of Class 4 of the D. K., that the wider category above described is meant.

The first rule as to these relations is identical with the first rule in Classes 1, 2, and 3, *i.e.* that the nearer in degree must take; and the next rule, as in Class 4, is that $\frac{2}{3}$ go to the paternal, and $\frac{1}{3}$ to the maternal, side. Subject to both these rules, the author of the Sir. is of opinion that descendants of relations of the whole blood are to be preferred to those of the C. relations, and, subject to that rule also, that a child of a residuary is preferred to a child of a d. k.‡ Thus, a Pat. uncle's

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* This is shown by the rule as to preference of the nearer in degree, for there could be no difference of degree if all were actual children of uncles or aunts.—*Vide* Sir. 40, 41; 46, 47; and *vide* also Shar. 98, and *infra*, Chap. VII., Ex. 7.

† This is shown by the rule as to preference of the child of a residuary, as "daughter of a paternal uncle," &c.—*Vide* Sir. 40, 41; 46, 47; and *vide* also Shar 98, and *infra*, Chap VII.., Ex. 7.

‡ It will easily be seen that a relation of the description under consideration cannot be a child of a sharer.

daughter is preferred to a Pat. aunt's son, and a C. Pat. uncle's daughter to a C. Pat. aunt's son, on account of the preference accorded to the child of a residuary; but, in the opinion of the author of the Sir., a Pat. aunt's son is preferred to a C. Pat. uncle's daughter, on account of the strength of blood, notwithstanding that the latter is the child of a residuary and the former that of a d. k.*

It is not expressly stated, nor can it be directly gathered from any example that we have met with, what is the opinion of Abu Yusuf as to the position of persons of this description of D. K. descended from U. relations. But it may be safely assumed that, consistently with Abu Yusuf's doctrine in Class 3 and with the general doctrine in Class 4,† such persons only inherit in the absence of descendants of whole blood and C. relations. For it seems clear from the Sir. that the divergence between Abu Yusuf and Muhammed only commences, in the case of this description of D. K., after the question of difference of "blood" has been disposed of‡; so that, if we can ascertain the opinion of one of these lawyers on a question respecting "blood," we may assume that those of the other are identical. Now it is clear that the application of Muhammed's principles leads to the order of succession above indicated. The "first line" consists of Pat. uncles, C. Pat. uncles, and D. K.

* This is according to "the clearer tradition," but some of "the learned" hold the opposite opinion.—Sir. 41; 46, 47.

† *Vide supra*, 74, 76.

‡ *Vide* Sir., chapter on "Children" of Class 4, especially the concluding sentences.—Sir. 42; 47.

of Class 4; and among these, if living, we know that the order of succession above suggested holds good.* It follows, therefore, from the branch of Muhammed's rule as to taking account of difference of "blood" in the first line,† that the order among their descendants must be the same. Hence it may be concluded that, in the opinion of Abu Yusuf also, the descendants of whole blood relations and those of C. relations, among D. K. of this description, take precedence of the descendants of U. relations.

The reader has no doubt observed that, among the different kinds of D. K., the various tests are not always applied in the same order; and, as it is essential, if he would arrive at a correct result in any particular case, to apply them in the order appropriate to the class or description to which the case belongs, it may be as well to assist him in doing so by tabulating them as follows:—

Class 1 of D. K.	Class 2 of D. K.	Class 3 of D. K.	Class 4 of D. K.	Descendants of Classes 4 of Res. and D.K.
1. Degree. 2. Child of heir or not.	1. Degree. 2. Related through heir or not. 3. Pat. or Mat. side.	1. Degree. 2. Child of residuary or not. 3. Blood.	1. Pat. or Mat. side. 2. Blood.	1. Degree. 2. Pat. or Mat. side. 3. Blood. 4. Child of residuary or not.

* Pat. uncles and C. Pat. uncles, of course, come first, as residuaries; and as to the others, *vide* rules as to D. K., Class 4, *supra*, 76.

† *Vide* Muhammed's rule, "First branch," *supra*, 66.

It is important, before quitting this branch of the subject, to caution the reader against being led astray by laying too much stress on the division into classes, and imagining that these classes are intended to exhaust, by a logical division, the whole category of the D. K. In order to obviate this danger, the reader has only to bear constantly in mind the definition of the D. K. as "all relations who are neither sharers nor residuaries"; and the statement that "these" (the classes) "and all who are related through them, are among the D. K."*

As in the case of residuaries, the question may be raised, what is to be done when there are relations in different lines who are not all within the limits of the classes? The same reasoning that has been used above with respect to residuaries would seem to apply, and it is not necessary to repeat it here.† It may be added, however, that there is a passage in the chapter of the Sir. as to the "children" of Class 4,‡ which, though a little vague and incomplete, tends, as far as it goes, to corroborate, both as to residuaries and as to D. K., the view which has been suggested. After describing the rule of Muhammed with reference to the persons treated of in that chapter, the author of the Sir. continues:—"Then this rule is applied to the sides of the

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* Sir. 28, 29; 33–35; and *vide supra*, 12, 58.

† *Vide supra*, 51, 52.

‡ These persons, it will be remembered, are of a wider description than that indicated by the words "children," &c.—*Vide supra*, 77.

paternal uncles of his parents and their maternal uncles; then to their children; then to the side of the paternal uncles of the parents of his parents; then to their maternal uncles; then to their children, as in the case of residuaries." * If this does not absolutely prove anything, it at least appears tacitly to recognise the principle that the residuary or D. K. descendants (as the case may be) of any given grandparent must be exhausted before persons of the same description descended from higher grandparents can be admitted. And as it is not stated that there is any difference of opinion between Muhammed and Abu Yusuf on the point, it may perhaps be safely concluded that the view suggested is that of Abu Yusuf also.

The reader is strongly advised, if he would thoroughly understand this chapter (especially the portion of it which deals with the curious rule of Muhammed) to work out the examples in Chapter VII., while the distinctions of classes, the order of the tests, &c., are fresh in his memory. By so doing he will obtain an insight into an intricate subject, and a power of practically working out complex cases, which he might seek in vain to arrive at in any other manner.

* Sir. 42; 47.

CHAPTER VI.

OF DIVISION OF THE PROPERTY AMONG SHARERS AND RESIDUARIES.

When the property of a deceased person is to be divided among several heirs, the modern European rules of arithmetic afford easy means of ascertaining the amount due to each claimant. Moohummudan writers have thrown an apparent obscurity over this subject by framing a number of minute and artificial rules applicable to particular classes of cases,* but the cloud is easily dispelled.

Mr. Macnaghten (Macn. Princ. pp. 166, &c.) works out

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* The object, or, at least, the effect, of these rules, is to enable the Moohummudan lawyer, by their aid, to solve problems of inheritance without any general knowledge of arithmetic. So far they may have their value; but, on the other hand, they seem tedious and obscure to those who are accustomed to European rules and European notation.

a number of examples according to the ancient and cumbrous methods, but we shall now work out the same and similar examples by European arithmetic, in order to show that it gives us precisely the same results, except were Macnaghten is clearly proved to be in error.* In order to make the coincidence more clearly apparent, we shall in each case reduce the resulting fractions to the least common denominator, as Mr. Macnaghten, following the Moohummudan Jurists, usually presents them in that form.†

EXAMPLE 1.—Father, mother, and two daughters. Here the shares are:—

Father	$\frac{1}{6}$
Mother	$\frac{1}{6}$
Two daughters	$\frac{2}{3}$

Hence each daughter's share $= \frac{2}{3} \div 2 = \frac{1}{3}$

Reducing the fractions $\frac{1}{6}$, $\frac{1}{6}$, $\frac{1}{3}$, to the least common denominator, we have: $\frac{1}{6}$, $\frac{1}{6}$, $\frac{2}{6}$.

Hence the father has . . .	$\frac{1}{6}$
,, mother . . .	$\frac{1}{6}$
,, each daughter . .	$\frac{2}{6}$

The property is therefore exactly divided, and there is nothing left for the father to take in his residuary capacity.

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* See note, *infra*, 87.

† The nature of the old Arabian rules given in the Sirájiyyah is such that the fractions are arrived at in this form, and there is no rule given for reducing them to lower terms.

EXAMPLE 2.—Father, mother, and ten daughters. Here we have:—

Father	$\frac{1}{6}$
Mother	$\frac{1}{6}$
Ten daughters	$\frac{2}{3}$

or each daughter $\frac{2}{3} \div 10 = \frac{1}{15}$

Reducing to the L. C. D., we have: $\frac{5}{30}$, $\frac{5}{30}$, $\frac{2}{30}$

Hence the father has . .	$\frac{5}{30}$
,, mother . . .	$\frac{5}{30}$
,, each daughter . .	$\frac{2}{30}$

Here, as in the last case, the property is exhausted.

EXAMPLE 3.—Father, mother, and five daughters:—

Father	$\frac{1}{6}$
Mother	$\frac{1}{6}$
Each daughter	$\frac{2}{3} \div 5 = \frac{2}{15}$

Reducing to the L. C. D., we have:—

Father	$\frac{5}{30}$
Mother	$\frac{5}{30}$
Each daughter . . .	$\frac{4}{30}$

Here, also, the property is exhausted.

EXAMPLE 4.—Six daughters, three tr. grandmothers, and three paternal uncles.

Here the three paternal uncles are residuaries; the shares are:—

6 daughters $\frac{2}{3}$, $\therefore$ each daughter $\frac{2}{3} \div 6 = \frac{1}{9}$

3 tr. grandmothers $\frac{1}{6}$, $\therefore$ each tr. grandmother $\frac{1}{6} \div 3 = \frac{1}{18}$

Here it is clear that the property is not exhausted by the sharers. To find the fractional part remaining for the residuaries after payment of the shares, we must subtract the shares from unity, or the whole; hence we have:—

Residue $1-\frac{2}{3}-\frac{1}{6}=1-\frac{5}{6}=\frac{1}{6}$
Each paternal uncle $\frac{1}{6}\div 3=\frac{1}{18}$

Reducing to the L. C. D.:—

Each daughter . . .	$\frac{2}{18}$
Each tr. grandmother . .	$\frac{1}{18}$
Each pat. uncle . . .	$\frac{1}{18}$

EXAMPLE 5.—Four wives, three tr. grandmothers, and twelve paternal uncles.

The paternal uncles are residuaries. The shares are:—

Four wives $\frac{1}{4}$, $\therefore$ each $\frac{1}{4}\div 4=\frac{1}{16}$
Three tr. grandmothers $\frac{1}{6}$, $\therefore$ each $\frac{1}{6}\div 3=\frac{1}{18}$

The part remaining for the residuaries is found as in the previous example, and we have:—

Residue $1-\frac{1}{4}-\frac{1}{6}=1-\frac{5}{12}=\frac{7}{12}$
Each pat. uncle $\frac{7}{12}\div 12=\frac{7}{144}$

Reducing to the L. C. D.:—

Each wife . . .	$\frac{9}{144}$
Each tr. grandmother . .	$\frac{8}{144}$
Each paternal uncle . .	$\frac{7}{144}$

EXAMPLE 6.—Four wives, eighteen daughters, fifteen tr. female ancestors,* and six paternal uncles. Here we have:—

4 wives $\frac{1}{8}$, ∴ each wife $\frac{1}{8} \div 4 = \frac{1}{32}$
18 daughters $\frac{2}{3}$, ∴ each daughter $\frac{2}{3} \div 18 = \frac{1}{27}$
15 tr. grandmothers $\frac{1}{6}$, ∴ each tr. grandmother $\frac{1}{6} \div 15 = \frac{1}{90}$

The portion remaining for the residuaries is:—

$$1 - \frac{1}{8} - \frac{2}{3} - \frac{1}{6} = 1 - \frac{23}{24} = \frac{1}{24}$$

Each paternal uncle $\frac{1}{24} \div 6 = \frac{1}{144}$

Reducing to the L. C. D.:—

Each wife	$\frac{135}{4320}$
Each daughter . . .	$\frac{160}{4320}$
Each tr. grandmother . .	$\frac{48}{4320}$
Each paternal uncle . .	$\frac{30}{4320}$

EXAMPLE 7.—Two wives, six tr. female ancestors,* ten daughters, and seven paternal uncles. Here we have:—

Two wives $\frac{1}{8}$, ∴ each wife $\frac{1}{8} \div 2 = \frac{1}{16}$
Six tr. grandmothers $\frac{1}{6}$, ∴ each tr. grandmother $\frac{1}{6} \div 6 = \frac{1}{36}$
Ten daughters $\frac{2}{3}$, ∴ each daughter $\frac{2}{3} \div 10 = \frac{1}{15}$

---

* *i.e.* True grandmothers, *vide supra*, 14. The reader must remember that these must be all on the same level, as even a single tr. grandmother in a nearer generation would exclude all the rest (*vide infra*, Chap. X.). Consequently the circumstances of this and several other examples are simply impossible, but they were probably framed by the Arabian lawyers for the purpose of testing the skill of their pupils.

Consequently there remains for the residuaries:—

$1-\frac{1}{8}-\frac{1}{6}-\frac{2}{3}=1-\frac{23}{24}=\frac{1}{24}$

Each paternal uncle $\frac{1}{24}\div 7=\frac{1}{168}$

Reducing to the L. C. D.:—

Each wife	$\frac{315}{5040}$
Each tr. grandmother . .	$\frac{140}{5040}$
Each daughter . . .	$\frac{336}{5040}$
Each paternal uncle . .	$\frac{30}{5040}$

EXAMPLE 8.—One wife, eight daughters, and four paternal uncles. Here we have:—

One wife $\frac{1}{8}$

Eight daughters $\frac{2}{3}$, $\therefore$ each daughter $\frac{2}{3}\div 8=\frac{1}{12}$

To find the portion of the residuaries:—

$1-\frac{1}{8}-\frac{2}{3}=1-\frac{19}{24}=\frac{5}{24}$

Each paternal uncle $\frac{5}{24}\div 4=\frac{5}{96}$

Reducing to the L. C. D.:—

Wife	$\frac{12}{96}$
Each daughter . . .	$\frac{8}{96}$
Each paternal uncle* . .	$\frac{5}{96}$

* In this example there is an arithmetical error in Macn. Princ. 172. It is there stated that the share of each paternal uncle is $\frac{4}{96}$. But it is of course plain that this would not exhaust the property, since:—

$$\frac{12}{96}+\frac{8\times 8}{96}+\frac{4\times 4}{96}=\frac{12+64+16}{96}=\frac{92}{96}$$

while on the other hand it will easily be seen that the division above given exhausts the whole, or, in Mr. Macnaghten's words, "makes up the required number 96"; for

$$\frac{12}{96}+\frac{8\times 8}{96}+\frac{5\times 4}{96}=\frac{12+64+20}{96}$$
$$=\frac{96}{96}$$
$$=1$$

EXAMPLE 9.—Husband, mother, father.

Here, remembering that the mother, under the particular circumstances, only takes a third of the residue after deducting the husband's share, we have:—

Husband, $\frac{1}{2}$
Mother, $\frac{1}{3}$ of $(1-\frac{1}{2})$, or $\frac{1}{6}$
Father (as sharer), $\frac{1}{6}$; (as residuary), $1-(\frac{1}{2}+\frac{2}{6})$, or $\frac{1}{6}$; total, $\frac{1}{3}$

Reducing to the L. C. D.:—

Husband	$\frac{3}{6}$
Mother	$\frac{1}{6}$
Father	$\frac{2}{6}$

EXAMPLE 10.—Wife, mother, father.

Here, in like manner, the mother only takes a third of the residue after deducting the wife's share, and we have:—

Wife, $\frac{1}{4}$
Mother, $\frac{1}{3}$ of $(1-\frac{1}{4})$, or $\frac{1}{4}$
Father (as sharer), $\frac{1}{6}$; (as residuary), $1-(\frac{1}{4}+\frac{1}{4}+\frac{1}{6})$, or $\frac{1}{3}$; total, $\frac{1}{2}$

Reducing to the L. C. D.:—

Wife	$\frac{3}{12}$
Mother	$\frac{3}{12}$
Father	$\frac{6}{12}$

EXAMPLE 11.—Husband, mother, pat. uncle. One of

the claimants agrees to take a specific article in lieu of his portion.*

The portions are, primarily:—

Husband	$\frac{1}{2}$
Mother	$\frac{1}{3}$
Pat uncle, residue . . .	$\frac{1}{6}$

First, let the husband agree to retain his wife's bridal gift, which he has not paid, and set it off against his claim. Then we have:—

Mother and pat. uncle, to share the remainder, or general estate, in the ratio $\frac{1}{3} : \frac{1}{6}$, or 2 : 1.

Hence we have:—

Mother	$\frac{2}{3}$
Pat. uncle	$\frac{1}{3}$

Secondly, let the mother agree to take a jewel instead of her share. Then we have:—

Husband and pat. uncle to take in the ratio $\frac{1}{2} : \frac{1}{6}$, or 3 : 1.

Therefore we have:—

Husband	$\frac{3}{4}$
Pat. uncle	$\frac{1}{4}$

* This and the following example present instances of what is called subtraction (*supra*, 13). They are worked by the rule of "proportional parts," which is also used in cases of return.—*Vide infra*, Chap. VIII.

Thirdly, let the pat. uncle take a carriage, or a slave, instead of his portion. Then we have:—

Husband and mother to take in the ratio $\frac{1}{2}:\frac{1}{3}$, or 3 : 2. Hence we have:—

Husband	$\frac{3}{5}$
Mother	$\frac{2}{5}$

EXAMPLE 12.—Mother, two U. sisters, pat. uncle's son. One of the U. sisters agrees to take a female slave instead of her portion. Primarily, the portions are:—

Mother, $\frac{1}{6}$
Two U. sisters, $\frac{1}{3}$; each, $\frac{1}{6}$
Pat. uncle's son, residue, $\frac{1}{2}$

But, as one U. sister disappears, the remaining property must be divided among the mother, the other U. sister, and the pat. uncle's son, in the ratio $\frac{1}{6}:\frac{1}{6}:\frac{1}{2}$, or 1 : 1 : 3. Hence we have:—

Mother	$\frac{1}{5}$
U. sister	$\frac{1}{5}$
Pat. uncle's son . . .	$\frac{3}{5}$

When the fractions have been ascertained in the manner shown in the above examples, it only remains, of course, to divide the property into the number of parts indicated by the L. C. D., and to give to each sharer or residuary as many of those parts as are indicated by the numerator of his particular fraction. Thus, for instance, in Example 8, the whole will be divided into 96 parts, of which 12 will be given to the wife, 8 to each daughter, and 5 to each paternal uncle.

CHAPTER VII.

OF DIVISION OF THE PROPERTY AMONG DISTANT KINDRED.

When it has been ascertained that there are no sharers or residuaries, but that there are several D. K. who, by reason of their being of the same class, appear *primâ facie* to be entitled to inherit together, it only remains to ascertain which of them are actually so entitled, and to divide the property among such persons according to the rules of the class or description to which they belong. We propose here to work out several examples which are given in the Sir. and Shar., or in one or the other of those works, showing how the distribution would take place according to the doctrine of Abu Yusuf on the one hand and according to that of Muhammed on the other. It may be observed that these examples are, in some respects, more simple than those which depend upon the calculation of shares and the respective rights of sharers and residuaries ; but, on the other hand, they sometimes involve nice questions as to the sexes of

ancestors and as to double chains of relationship, which, in another aspect, render them still more complicated. It is scarcely worth while to weary the reader with a mass of the simpler sort of cases, which merely require equal division, with a double share to a male, and it will accordingly be seen that each of the examples given in this chapter serves to illustrate some special feature. As in the case of sharers and residuaries, we shall, in each instance, reduce the resulting fractions to the L. C. D.

EXAMPLE 1 (Class 1).—This example shows the mode of dividing the property when each of the claimants is descended from a son or daughter, but their rights are different *inter se* by reason of differences of sex. From the subjoined figure, in which "S" (son) stands for male, and "D" (daughter),* for female, it will be seen that there are twelve claimants, three male and nine female,† each descended, through a line of four intermediate relations, from a son or daughter of the deceased.‡ It will be seen that the degrees are equal, and that there is no child of an heir.

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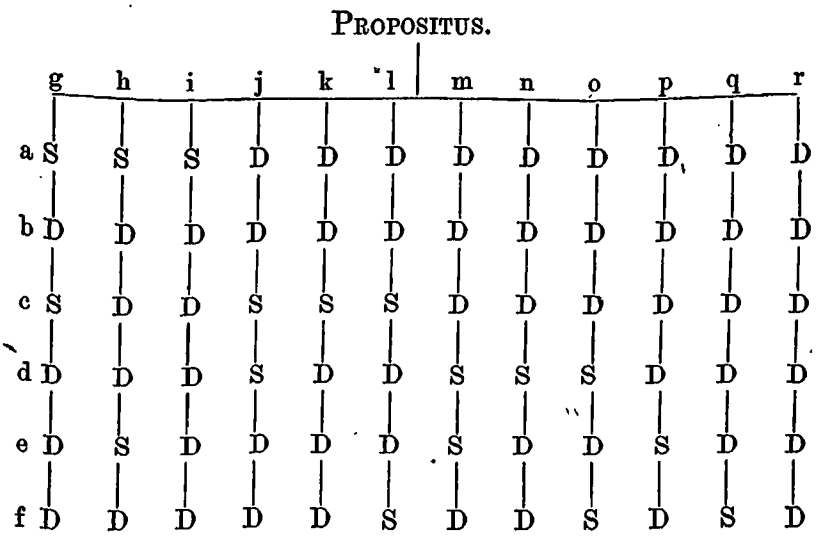
* The Sir. uses these letters in the following example, and we propose to use them here, and whenever the relationships are such as to make the full descriptions of the claimants long and cumbrous.

† In this and the other figures in this chapter the persons in the lowest line are the actual claimants, those above them being supposed to have died before the propositus.

‡ Sir. 32; 38; or it may be considered (with the same results), that the first generation consists of remoter descendants, the only essential condition being that it must be the first generation in which the sexes differ.


Propositus.
g h i j k l m n o p q r
a S S S D D D D D D D D D
b D D D D D D D D D D D D
c S D D S S S D D D D D D
d D D D S D D S S S D D D
e D S D D D D S D D S D D
f D D D D D S D D S D S D

According to Abu Yusuf, the property is divided according to the ordinary rule, *i.e.* equally among males and females respectively, but with a double share to each male; and no regard is paid to the variations of sex in the chains of relationship. Hence we have:—

3 S (equal to 6 females), $\frac{6}{15}$; each $\frac{2}{15}$
9 D, $\frac{9}{15}$; each $\frac{1}{15}$

We next proceed to solve the problem according to Muhammed's rule, first, third, and fourth branches. In order to render the work intelligible, we place the letters a, b, c, &c., on the left of the several horizontal lines representing the six generations, and g, h, i, &c., at the head of the several columns setting forth the twelve lines of descent. We shall designate each individual by the two letters ag, bg, or the like, standing

opposite the capital letter indicating such individual: thus, ag will mean the male in the first horizontal line and first column; bg, the female in the second horizontal line and first column; and so on.

First, as there are three males, ag—ai, and nine females, aj—ar, in the first generation in which the sexes differ, we shall have in that generation, according to the rule which gives a double share to a male:—

ag—ai, $\frac{6}{15}$ or $\frac{2}{5}$
aj—ar, $\frac{9}{15}$ or $\frac{3}{5}$

In the second generation, as there is no difference of sex among the descendants of either group, there will be no alteration in the fractions; and we shall have:—

bg—bi, $\frac{2}{5}$
bj—br, $\frac{3}{5}$

In the third generation, remembering that the fractions arising from the groups of males and females are to be divided among their respective descendants, and having regard to the differences of sex that arise among the descendants of each group, we have:—

cg, $\frac{1}{2}$ of $\frac{2}{5}$, or $\frac{1}{5}$
ch, ci, $\frac{1}{2}$ of $\frac{2}{5}$, or $\frac{1}{5}$
cj—cl, $\frac{1}{2}$ of $\frac{3}{5}$, or $\frac{3}{10}$
cm—cr, $\frac{1}{2}$ of $\frac{3}{5}$, or $\frac{3}{10}$

In the fourth generation, proceeding as before, and remembering that the descendants of an individual once separated can never be joined in a group with the

descendants of any other individual or group, we have:—

dg, $\frac{1}{5}$
dh, di, $\frac{1}{5}$
dj, $\frac{1}{2}$ of $\frac{3}{10}$, or $\frac{3}{20}$
dk, dl, $\frac{1}{2}$ of $\frac{3}{10}$, or $\frac{3}{20}$
dm—do, $\frac{2}{3}$ of $\frac{3}{10}$, or $\frac{1}{5}$
dp—dr, $\frac{1}{3}$ of $\frac{3}{10}$, or $\frac{1}{10}$

Similarly, in the fifth generation:—

eg, $\frac{1}{5}$
eh, $\frac{2}{3}$ of $\frac{1}{5}$, or $\frac{2}{15}$
ei, $\frac{1}{3}$ of $\frac{1}{5}$, or $\frac{1}{15}$
ej, $\frac{3}{20}$
ek, el, $\frac{3}{20}$
em, $\frac{1}{2}$ of $\frac{1}{5}$, or $\frac{1}{10}$
en, eo, $\frac{1}{2}$ of $\frac{1}{5}$, or $\frac{1}{10}$
ep, $\frac{1}{2}$ of $\frac{1}{10}$, or $\frac{1}{20}$
eq, er, $\frac{1}{2}$ of $\frac{1}{10}$, or $\frac{1}{20}$

In the sixth, or last, generation:—

fg, $\frac{1}{5}$, or $\frac{12}{60}$
fh, $\frac{2}{15}$, or $\frac{8}{60}$
fi, $\frac{1}{15}$, or $\frac{4}{60}$
fj, $\frac{3}{20}$, or $\frac{9}{60}$
fk, $\frac{1}{3}$ of $\frac{3}{20}$, or $\frac{1}{20}$, or $\frac{3}{60}$
fl, $\frac{2}{3}$ of $\frac{3}{20}$, or $\frac{1}{10}$, or $\frac{6}{60}$
fm, $\frac{1}{10}$, or $\frac{6}{60}$
fn, $\frac{1}{3}$ of $\frac{1}{10}$, or $\frac{1}{30}$, or $\frac{2}{60}$
fo, $\frac{2}{3}$ of $\frac{1}{10}$, or $\frac{1}{15}$, or $\frac{4}{60}$

fp, $\frac{1}{20}$, or $\frac{3}{60}$
fq, $\frac{2}{3}$ of $\frac{1}{20}$, or $\frac{1}{30}$, or $\frac{2}{60}$
fr, $\frac{1}{3}$ of $\frac{1}{20}$, or $\frac{1}{60}$

The Sir. does not give the result of this problem, but the Shar. gives it as above, stating that the estate must be divided into sixty parts, of which the several claimants will take respectively, in their order from the left hand, 12, 8, 4, 9, 3, 6, 6, 2, 4, 3, 2, 1.*

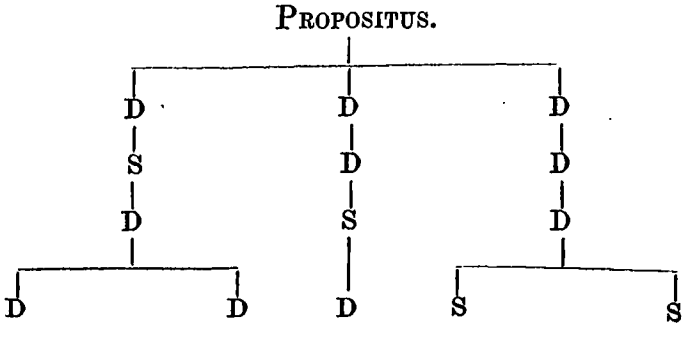
It is particularly important to observe, in the working of the above example, the application of the fourth branch of Muhammed's rule, under which, it will be remembered, the descendants of a group or individual once separated are not to be joined in a group with the descendants of any other group or individual. Thus, the portion of cg descends unaltered to dg, eg, and fg in succession, and the portions of eh and ei descend in like manner respectively to f h and f i, while, on the other hand, those of en and eo and those of eq and er, respectively, remain combined, and have to submit to a fresh adjustment in the next generation. The reader must firmly grasp this principle in his mind, if he desires to be able to apply Muhammed's rule to other examples.

The reader will see from this example that the system of grouping, which forms so prominent a feature in the above rule, produces a very different result from that which would arise from a system of pure represen-

* Shar. 95.

tation ; for, if the latter system were adopted, the portion of each individual in the first line would descend unaltered to his own posterity in the last line, so that the several numerators would be (the denominator 60 being retained) 8, 8, 8, 4, 4, 4, 4, 4, 4, 4, 4, 4. On the other hand, it will readily be perceived that the fourth branch of Moohummud's rule makes the result very different from what it would be if the system of grouping were allowed to proceed to the end without the restriction imposed by that branch.

EXAMPLE 2 (Class 1).—This example involves the new feature of several claimants being descended from individuals in a higher line. The subjoined figure shows that the degrees are equal, and that there is no child of an heir ; but that from one daughter are descended two female claimants; from another, one such claimant; from a third, two male claimants.*



According to Abu Yusuf, we have:—

3 D, $\frac{3}{7}$, each $\frac{1}{7}$

2 S (equal to 4 D). $\frac{4}{7}$, each $\frac{2}{7}$

* Sir. 32 ; 38.

According to Muhammed, having regard to the second branch of his rule as well as to the branches already illustrated, the problem will be solved as follows:—

In the second line, which is the first in which the sexes differ, there is one male and there are two females; but the male is to be considered equal to two males, by reason of his having two descendants among the claimants; and, *pari ratione*, the second female in that line is to be considered equal to two females. Hence, in the second line, we have:—

S, $\frac{4}{7}$
2 D, $\frac{3}{7}$

The male stands alone, and therefore (as we have seen in the previous example) his portion descends unaltered to his daughter. On the other hand, the two females form a group, so that the aggregate of their portions will become divisible in the next generation; but it must be remembered that the male is equal to two females, and that the female, whether we look upon her as representing her mother, or as having, herself, two descendants among the claimants, must also be considered equal to two females. Hence, in the third line:—

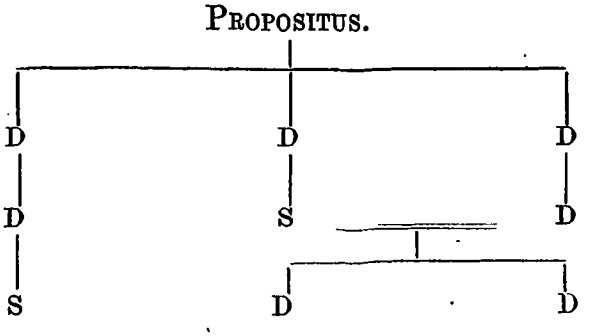
1st D, $\frac{4}{7}$
S, $\frac{1}{2}$ of $\frac{3}{7}$, or $\frac{3}{14}$
2nd D, $\frac{1}{2}$ of $\frac{3}{7}$, or $\frac{3}{14}$

Each individual in this line is isolated, so that his or her portion goes to his or her respective offspring

among the claimants. Hence we have, in the fourth line:—

1st D, $\frac{1}{2}$ of $\frac{4}{7}$, or $\frac{2}{7}$, or $\frac{8}{28}$
2nd D, $\frac{8}{28}$
3rd D, $\frac{3}{14}$, or $\frac{6}{28}$
1st S, $\frac{1}{2}$ of $\frac{3}{14}$, or $\frac{3}{28}$
2nd S, $\frac{3}{28}$

EXAMPLE 3 (Class 1).—This example has the additional feature of descent from the propositus through two intermediate relations. The figure shows that the degrees are equal, and that there is no child of an heir.*



According to Abu Yusuf:—

S (equal to two females), $\frac{2}{6}$, or $\frac{1}{3}$
2nd D (equal to four females, as they inherit both through their father and through their mother), $\frac{4}{6}$, or $\frac{2}{3}$; each $\frac{1}{3}$

* Sir. 34; 40.

According to Muhammed:—

In the second line, or first line in which the sexes differ, there is one male and there are two females; but (as seen in the preceding example) the male becomes equal to two males, and one of the females equal to two females. Thus we have, in the second line:—

2 D, $\frac{3}{7}$
S, $\frac{4}{7}$

The male stands alone, so that his portion will descend to his own posterity. The two females form a group, so that their portion becomes divisible among their descendants in the next line. Hence, in the third line:—

S, $\frac{1}{2}$ of $\frac{3}{7}$, or $\frac{3}{14}$, or $\frac{6}{28}$
2 D (from their father), $\frac{4}{7}$, or $\frac{16}{28}$;
(from their mother), $\frac{1}{2}$ of $\frac{3}{7}$, or $\frac{3}{14}$, or $\frac{6}{28}$; total, $\frac{22}{28}$; each $\frac{11}{28}$

It may be as well to observe that, in these and similar examples, although the first line are called "sons" and "daughters," the same reasoning would apply if they were remoter descendants, provided that there was no difference of sex in any higher line; for it is not necessarily the first line, but the "first line in which the sexes differ," that we have to consider.

The Sir. and Shar. do not give any examples in Class 2, probably because there is no difference of

opinion as to that class, Muhammed's rule, so far as it is applicable, being adopted, apparently, without question.

EXAMPLE 4 (Class 3).—Brother's daughter, son and daughter of sister, and corresponding C. and U. relations.*

Here there is equality of degree, and some of the claimants are children of residuaries, while others are children of sharers, but none are children of D. K.

According to Abu Yusuf, the whole blood relations will take all; but, further, if there were no whole blood relations, the C. relations would take all; and, lastly, if there were neither whole blood nor C. relations, the U. relations would take all. In either case the division must be made in the usual manner, the male claimant taking the portion of two females. Thus we have, in the first case:—

Brother's daughter, $\frac{1}{4}$
Sister's son, $\frac{1}{2}$
Sister's daughter, $\frac{1}{4}$
C. and U. relations, nothing.

In the second case:—

C. brother's daughter, $\frac{1}{4}$
C. sister's son, $\frac{1}{2}$
C. sister's daughter, $\frac{1}{4}$
U. relations, nothing.

---

* Sir. 37; 43.

In the third case:—

U. brother's daughter, $\frac{1}{4}$
U. sister's son, $\frac{1}{2}$
U. sister's daughter, $\frac{1}{4}$

On the other hand, Muhammed's result is thus expressed*:—"A third of the estate is divided equally among the branches by the same mother, in thirds, by considering the equality of their roots in the division of the parents, and the remainder among the branches of the whole blood in moieties, by considering in the roots the number of the branches; one half to the daughter of the brother, the portion of the father, and the other half between the children of the sister, the male having the allotment of two females, by considering the persons; and the estate is correctly divided by nine."

The following, it is submitted, is the actual working by which the above result must be arrived at. It will be perceived that the fifth branch of the rule here comes into play.

First, the U. brother and sister, who are sharers, take $\frac{1}{3}$; the C. brother and C. sister are excluded by the brother; the sister is primarily a sharer, taking $\frac{1}{2}$, but she becomes a residuary in the presence of the brother, and they take the residue, $\frac{2}{3}$, between them in the usual manner.

But the U. sister has two "branches," therefore she

* The working is not given in the Sir. or Shar.

is equal to two (the U. brother and sister being, as will be remembered, primarily equal); on the other hand, the brother, as a male, is equal to two females; but the sister, having two branches, is also equal to two females. Hence we have, in the first line:—

U. brother, $\frac{1}{3}$ of $\frac{1}{3}$, or $\frac{1}{9}$
U. sister, $\frac{2}{3}$ of $\frac{1}{3}$, or $\frac{2}{9}$
Brother, $\frac{1}{2}$ of $\frac{2}{3}$, or $\frac{1}{3}$
Sister, $\frac{1}{2}$ of $\frac{2}{3}$, or $\frac{1}{3}$

Next, the U. sister's portion descends to her son and daughter *equally*, by analogy with U. brother and U. sister, who, primarily, take equally if living; but the sister's portion is divided between her son and daughter in the usual manner, the male taking a double share. The U. brother's and brother's portions descend unchanged. Thus we have:—

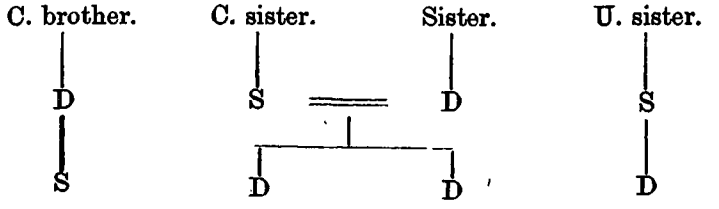
U. brother's daughter, $\frac{1}{9}$
U. sister's son, $\frac{1}{2}$ of $\frac{2}{9}$, or $\frac{1}{9}$
U. sister's daughter, $\frac{1}{2}$ of $\frac{2}{9}$, or $\frac{1}{9}$
Brother's daughter, $\frac{1}{3}$, or $\frac{3}{9}$
Sister's son, $\frac{2}{3}$ of $\frac{1}{3}$, or $\frac{2}{9}$
Sister's daughter, $\frac{1}{3}$ of $\frac{1}{3}$, or $\frac{1}{9}$

It is observable that the portions of the persons of different "bloods" are kept distinct; and this is an important characteristic of Muhammed's rule, wherever difference of blood occurs. Another important feature which has been seen in the working is that rigid

regard to the individual rights of deceased persons, which, indeed, forms the key-stone of Muhammed's rule throughout, but which is here seen more conspicuously than in any of the previous examples.

EXAMPLE 5 (Class 3).—C. brother's daughter's son, U. sister's son's daughter, and two female relations who are sister's daughter's daughters and also C. sister's son's daughters.*

The following figure will make this example more readily intelligible.



Here the degrees are equal, and there is no child of a residuary.

According to Abu Yusuf, the descendants of the sister exclude those of the C. brother and U. sister; and they take all as such descendants, their claim as such being superior to their claim as descendants of a C. sister. Hence we have:—

2 sister's daughter's daughters, the whole; each $\frac{1}{2}$

* This case is taken by Mr. Baillie (Bail. M.L.I., 103) from an edition of the Sir. and Shar. to which the author has not had access. It does not appear in the edition so frequently referred to in these pages; but it is interesting and instructive, and the author has therefore thought it as well to insert it in this work.

According to the principles of Muhammed, we have, in the first line:—

Sister (having two descendants among the claimants), equal to two sisters, $\frac{2}{3}$
U. sister, $\frac{1}{6}$

The C. brother and C. sister would, if living, take as residuaries; now the former is equal to two females as being a male, and the latter as having two descendants among the claimants; consequently they divide the residue, $\frac{1}{6}$, equally; and we have, further:—

C. brother, $\frac{1}{2}$ of $\frac{1}{6}$, or $\frac{1}{12}$
C. sister, $\frac{1}{2}$ of $\frac{1}{6}$, or $\frac{1}{12}$

As each of the four persons above mentioned stands alone, there is no grouping in the lower generations, and the portions descend without further subdivision. Hence, in the third line:—

C. brother's D's S, $\frac{1}{12}$, or $\frac{2}{24}$
2 { Sister's D's D . / C. sister's S's D . } $\frac{2}{3}+\frac{1}{12}$, or $\frac{3}{4}$; each $\frac{3}{8}$ or $\frac{9}{24}$
U. sister's S's D, $\frac{1}{6}$, or $\frac{4}{24}$

EXAMPLE 6 (Class 4*).—U. maternal uncle, and a

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* It will be remembered that, in this class, there is no conflict between Abu Yusuf and Muhammed.—*Vide supra*, 65.

female relation who is both C. paternal aunt and U. maternal aunt.*

First, $\frac{2}{3}$ go to the pat. side, and $\frac{1}{3}$ to the mat. side. On the mat. side, on which there are two claimants, there is no difference of blood, but there is a difference of sex. Hence we have:—

C. pat. aunt (as such), $\frac{2}{3}$
U. mat uncle, $\frac{2}{3}$ of $\frac{1}{3}$, or $\frac{2}{9}$
U. mat. aunt (as such), $\frac{1}{3}$ of $\frac{1}{3}$, or $\frac{1}{9}$

Hence the final result will be:—

U. mat. uncle, $\frac{2}{9}$
C. pat. aunt . } $\frac{2}{3}+\frac{1}{9}$, or $\frac{7}{9}$
U. mat. aunt . }

EXAMPLE 7 (Descendants of Classes 4 of Residuaries and D. K.).—Two C. pat. uncle's daughter's daughters, who are also C. pat. aunt's son's daughters, two daughter's sons of another C. pat. aunt, two C. mat. uncle's daughter's sons, who are also C. mat. aunt's son's sons, and two daughter's daughters of another C. mat. aunt.†

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* Shar. 97. This singular combination is arrived at by supposing that the propositus had a grandfather who was married twice, and a grandmother who was married three times. This is shown in the Shar. by a figure, but it is not necessary for the purposes of the example.

† Shar. 98. The C. mat. uncle is made, by erroneous punctuation in the Shar., to appear to be a mat. uncle of the whole blood; but, if he were so, the result would be quite different, as his descend-

There is no difference of degree, therefore $\frac{2}{3}$ will go to the paternal side and $\frac{1}{3}$ to the maternal side.

Looking now at each side separately, we find that there is no difference of blood, and that there are no children of residuaries.

Hence, according to Abu Yusuf:—

On the pat. side, the two female claimants count as four females, by reason of their double descent; while the two male claimants count as four females on account of their sex. On the mat. side, the two male claimants count as eight females, for each is normally equal to two females; and each has a double descent, while the two females count merely as two, having only one descent. Hence we have:—

2 { C. pat. uncle's daughter's daughters . . . ; C. pat aunt's son's daughters . . . . } $\frac{4}{8}$ of $\frac{2}{3}$, or $\frac{1}{3}$

Each $\frac{1}{6}$, or $\frac{5}{30}$

2 C. pat. aunt's daughter's sons, $\frac{4}{8}$ of $\frac{2}{3}$, or $\frac{1}{3}$

Each $\frac{1}{6}$, or $\frac{5}{30}$

2 { C. mat. uncle's daughter's sons . . . . ; C. mat. aunt's son's sons . } $\frac{8}{10}$ of $\frac{1}{3}$, or $\frac{4}{15}$

Each $\frac{2}{15}$, or $\frac{4}{30}$

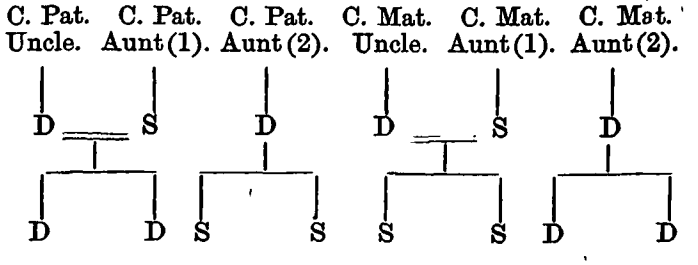
---

ants would take the whole portion of the maternal side. It is clear, therefore, that a C. mat. uncle is meant.

2 C. mat. aunt's daughter's daughters, $\frac{2}{10}$ of $\frac{1}{3}$, or $\frac{1}{15}$

Each $\frac{1}{30}$

According to Muhammed (having regard to the sixth branch of his rule, here illustrated for the first time), and making use of the subjoined figure and of the numbers (1) and (2), which are unnecessary in the simpler calculation which precedes, we shall have:—



Paternal side, first line:—

C. pat uncle, having two claimants descended from him, is equal to two males, or four females. Two C. pat. aunts, having, each, two descendants among the claimants, are equal to four females. Hence:—

C. pat. uncle, $\frac{4}{8}$ of $\frac{2}{3}$, or $\frac{1}{3}$
2 C. pat. aunts, $\frac{4}{8}$ of $\frac{2}{3}$, or $\frac{1}{3}$

Paternal side, second line:—

C. pat. uncle's D, $\frac{1}{3}$
C. pat. aunt's (1) S, $\frac{2}{3}$ of $\frac{1}{3}$, or $\frac{2}{9}$
C. pat. aunt's (2) D, $\frac{1}{3}$ of $\frac{1}{3}$, or $\frac{1}{9}$

Paternal side, third line:—

2 { C. pat. uncle's D's D . } $\frac{1}{3}+\frac{2}{9}$, or $\frac{5}{9}$; each $\frac{5}{18}$,
{ C. pat. aunt's (1) S's D } or $\frac{10}{36}$

2 C. pat. aunt's (2) D's S, $\frac{1}{9}$; each $\frac{1}{18}$, or $\frac{2}{36}$

Maternal side, first line:—

C. mat. uncle is equal to four females, and two C. mat. aunts to four females (the reasoning being the same as on the paternal side). Hence:—

C. mat. uncle, $\frac{1}{2}$ of $\frac{1}{3}$, or $\frac{1}{6}$

2 C. mat. aunts, $\frac{1}{2}$ of $\frac{1}{3}$, or $\frac{1}{6}$

Maternal side, second line:—

C. mat. uncle's D, $\frac{1}{6}$

C. mat. aunt's (1) S, $\frac{2}{3}$ of $\frac{1}{6}$, or $\frac{1}{9}$

C. mat. aunt's (2) D, $\frac{1}{3}$ of $\frac{1}{6}$, or $\frac{1}{18}$

Maternal side, third line:—

2 { C. mat. uncle's D's S . } $\frac{1}{6}+\frac{1}{9}$, or $\frac{5}{18}$; each $\frac{5}{36}$
{ C. mat. aunt's (1) S's S }

2 C. mat. aunt's (2) D's D, $\frac{1}{18}$; each $\frac{1}{36}$ *

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* We have not thought it necessary, at the second stage, to repeat the reasoning as to the number of descendants among the claimants; for, as each person has the same number, the proportions must remain the same.

CHAPTER VIII.

OF THE INCREASE AND RETURN.

It is obvious that, in a system involving the division of unity into a number of arbitrary fractional parts, it may happen that the fractions when added together are sometimes greater, and sometimes less, than the whole. The former contingency, of course, occasions a difficulty whenever it occurs, the latter only when there are no residuaries. The doctrine of the "Increase" (*aul*) provides for the former class of cases; and that of the "Return" (*rudd*) for the latter.

The Increase is the division of the property into a larger number of parts than that indicated by the least common denominator of the fractional shares. The rule is, to increase the L. C. D. so as to make it equal to the sum of the numerators; in other words, to the aggregate number of parts required.

EXAMPLE 1.—Husband, father, mother, daughter.

Husband	$\frac{1}{4}$
Father	$\frac{1}{6}$
Mother	$\frac{1}{6}$
Daughter	$\frac{1}{2}$

Reducing these to the L. C. D. we have,—

$$\frac{3}{12}, \frac{2}{12}, \frac{2}{12}, \frac{6}{12};$$

that is, in all, $\frac{13}{12}$, which would be more than the whole. Increasing the number of parts (that is, the L. C. D.) to 13, we have:—

Husband	$\frac{3}{13}$
Father	$\frac{2}{13}$
Mother	$\frac{2}{13}$
Daughter	$\frac{6}{13}$

It is evident that the sum of the fractions will now be $\frac{13}{13}$ or 1; that is to say, it will exactly exhaust the whole.

The above rule is so extremely simple, that the reader will perhaps fail to perceive at the first glance that the property has been justly divided among the claimants in the exact ratio of their original shares. Such, however, is the case, for it is obvious that—

$$\frac{3}{13} : \frac{2}{13} : \frac{2}{13} : \frac{6}{13} = 3 : 2 : 2 : 6 = \frac{3}{12} : \frac{2}{12} : \frac{2}{12} : \frac{6}{12}*$$

* Where there are several claimants for one original share, it may sometimes be found more convenient to increase the denominator at a later stage, and of course the effect will be the same.

EXAMPLE 2.—Husband, mother, sister.

Husband	$\frac{1}{2}$
Mother	$\frac{1}{3}$
Sister	$\frac{1}{2}$

But $\frac{1}{2}+\frac{1}{3}+\frac{1}{2}=\frac{3}{6}+\frac{2}{6}+\frac{3}{6}=\frac{8}{6}$

Hence this is a case of increase, and the denominator must be increased to 8; we shall then have:—

Husband	$\frac{3}{8}$
Mother	$\frac{2}{8}$
Sister	$\frac{3}{8}$

EXAMPLE 3.—Husband, two sisters, two U. sisters, mother.*

Husband	$\frac{1}{2}$
Two sisters	$\frac{2}{3}$
Two U. sisters	$\frac{1}{3}$
Mother	$\frac{1}{6}$

But $\frac{1}{2}+\frac{2}{3}+\frac{1}{3}+\frac{1}{6}=\frac{3}{6}+\frac{4}{6}+\frac{2}{6}+\frac{1}{6}=\frac{10}{6}$

Hence the denominator must be increased to 10; and we have:—

Husband	$\frac{3}{10}$
Two sisters . . .	$\frac{4}{10}$; each $\frac{1}{5}$, or $\frac{2}{10}$
Two U. sisters . .	$\frac{2}{10}$; each $\frac{1}{10}$
Mother	$\frac{1}{10}$

* This case is known as the case of Shuraihiyya, after Shuraih, the judge who decided it. It is taken from Shar. 83, 84, and is valuable as an example of the succession of U. sisters notwithstanding the presence of the mother and of sisters. *Vide infra*, Chap. X.

EXAMPLE 4.—Wife, father, mother, two daughters.*

Wife	$\frac{1}{8}$
Father	$\frac{1}{6}$
Mother	$\frac{1}{6}$
Two daughters	$\frac{2}{3}$

But $\frac{1}{8}+\frac{1}{6}+\frac{1}{6}+\frac{2}{3}=\frac{3}{24}+\frac{4}{24}+\frac{4}{24}+\frac{16}{24}=\frac{27}{24}$

Hence the denominator must be increased to 27, and we have:—

Wife	$\frac{3}{27}$
Father	$\frac{4}{27}$
Mother	$\frac{4}{27}$
Two daughters	$\frac{16}{27}$, each $\frac{8}{27}$

The Sir., in the chapter on the increase, states that particular "divisors" (*i.e.* the least common denominators of the original shares) may be increased in particular ways (*e.g.* 6 to 10, 12 to 17, &c.), which might, at first sight, be thought to imply that no other mode of increase is allowable.† But this does not seem to be a correct view of the doctrine of the increase, which, from the actual definition given in the Sir., appears to be applicable to all cases in which the L. C. D. is insufficient.‡ It may fairly be concluded, therefore, that

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* This is called the case of *Mimberiyya*, having been decided by Ali when in the *mimbar*, or pulpit, at Cufa.

† Sir. 15; 18, 19.

‡ "Aul, or *increase*, is when some fraction remains above the *regular* divisor, or when the divisor is too small to admit of one share."—Sir. 15; 18.

the statements as to particular "divisors" are only made in that spirit of yearning for enumeration which is so frequently to be discerned in the Sir., and that if any other instances are found possible, they must be considered good law. The disputed case of increase to 31, in the same place, turns, not really on the doctrine of the increase, but on the question whether persons incapable of inheriting can exclude imperfectly.

The Return is the apportionment of the surplus among the sharers (except husband and wife,* who are not allowed to partake of it), when the shares do not exhaust the property and there are no residuaries. Zaid the son of Thabit, and some other lawyers, have maintained that there is no return, but that the surplus goes to the public treasury; but the author of the Sir. considers the opposite opinion to be correct, on the authority of all the Prophet's companions, including Ali and his followers, and also of the sages whom he calls "our masters."† Residuaries for special cause, however, take precedence of the return.‡

The rule is, that the surplus is distributed among the sharers in the ratio of their respective shares. In cases of return, as in the primary distribution, we shall solve the examples by the rules of modern arithmetic.

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* Examples illustrative of this doctrine will be found *infra*, 116, &c. Although the husband and wife have not, technically speaking, any return, yet there are instances in which the whole residue has been said to revert to them: *supra*, 44.

† Sir. 22; 27.

‡ *Vide infra*, Chap. XIII.

EXAMPLE 5.—Two daughters.

It is obvious that as the two daughters divide, first, their proper share, $\frac{2}{3}$, and then the return, equally, they divide the whole equally. We have:—

Each daughter's ultimate share* $\frac{1}{2}$

The ultimate share of each of two sisters, &c., would of course be arrived at in the same way.

EXAMPLE 6.†—Mother and 2 daughters.

Mother, $\frac{1}{6}$

Daughters, $\frac{2}{3}$ ∴ each daughter $\frac{1}{3}$

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* We shall use the words ultimate share for the sake of brevity to express *share added to return.*

† This and some other examples are worked by the rule of "Proportional Parts." See "Colenso's Arithmetic," or any other modern arithmetical treatise. It is unnecessary to begin by finding the amount of the surplus, as will appear from the following reasoning:—

Let there be a number, $m+n$, and let $m=a+b$. Then, if we divide n (the surplus) in the ratio $a : b$, we have:—

$$\frac{a}{a+b}n, \quad \frac{b}{a+b}n$$

And, if we divide the whole number $m+n$ in the same ratio, we have:—

$$\frac{a}{a+b}(m+n), \frac{b}{a+b}(m+n)$$

$$\text{but } \frac{a}{a+b}(m+n) = \frac{am+an}{a+b}$$

$$= a + \frac{a}{a+b}n$$

$$\text{Similarly } \frac{b}{a+b}(m+n) = b + \frac{b}{a+b}n$$

Whence it appears that, if we divide the whole estate in the ratio $a : b$ (a and b being the original shares), the result is the same if we divided the surplus in that ratio, and added the parts to the respective shares.

The whole must therefore be divided in the ratio $\frac{1}{6}:\frac{2}{3}$, or 1 : 4. Consequently we have:—

Mother's ultimate share, $\frac{1}{5}$ of $1=\frac{1}{5}$
Daughter's ultimate share, $\frac{4}{5}$ of $1=\frac{4}{5}$*
Each daughter, $\frac{2}{5}$

EXAMPLE 7.—Husband and 3 daughters.

Here it is obvious that, as the husband has no return, the daughters, as sharers and by return, must take all the rest. Therefore the $\frac{3}{4}$ left after payment of his share will be divided among the daughters. Hence we have:—

Husband, $\frac{1}{4}$
Each daughter's ultimate share, $\frac{1}{4}$

EXAMPLE 8.—Husband and 6 daughters.

Here, as in Example 3, we must divide the remaining $\frac{3}{4}$ among the daughters, and we have:—

Husband, $\frac{1}{4}$
Each daughter's ultimate share, $\frac{3}{4}\div 6=\frac{1}{8}$

---

* Mr. Macnaghten (p. 176) divides the surplus into 6, giving the mother 2 and the daughters 4. This is, of course, an error. The result, as given above, is in accordance with the principles of the Sirájiyyah, "The return is the converse of the increase; and it takes place in what remains above the shares of those entitled to them, when there is no legal claimant of it; this surplus is then returned to the sharers *according to their rights*"; in other words (as shown by the examples in the Sirájiyyah, and the universal practice), in the ratio of their original shares. If, in the present instance, we have recourse to the empirical rules of the Sir., we arrive at the same result; for we are told, when there are two-thirds and a sixth, to "settle the case" by five. (Sir. 22; 28.)

Reducing $\frac{1}{4}$ and $\frac{1}{8}$ to the L. C. D., we get:—

Husband, $\frac{2}{8}$

Each daughter's ultimate share, $\frac{1}{8}$

EXAMPLE 9.—Husband and 5 daughters.

Here we have:—

Each daughter's ultimate share, $\frac{3}{4} \div 5 = \frac{3}{20}$

Reducing $\frac{1}{4}$ and $\frac{3}{20}$ to the L. C. D., we have:—

Husband, $\frac{5}{20}$

Each daughter's ultimate share, $\frac{3}{20}$

EXAMPLE 10.—Wife, 4 tr. paternal grandmothers, 6 uterine sisters.*

Wife, $\frac{1}{4}$

Paternal grandmothers, $\frac{1}{6}$

Uterine sisters, $\frac{1}{3}$

As the wife has no return, the paternal grandmothers and U. sisters will have all after payment of her $\frac{1}{4}$. Hence we have $1 - \frac{1}{4}$ or $\frac{3}{4}$ to be divided in the ratio† of $\frac{1}{6} : \frac{1}{3}$ or $1 : 2$.

Tr. paternal grandmothers, $\frac{1}{3}$ of $\frac{3}{4} = \frac{1}{4}$; each $\frac{1}{16}$

Uterine sisters, $\frac{2}{3}$ of $\frac{3}{4} = \frac{1}{2}$; each $\frac{1}{12}$

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* In this and the following example, we have put "tr. paternal grandmothers," because the cases are so stated in Macnaghten; but the reader will readily see that, if the word paternal were omitted, the result would be precisely the same. *Vide* Table of Sharers, *supra*, 17, &c.; and Rules of Exclusion, *infra*, Chap. X.

† As in Example 6, so in this and any similar example, it is not necessary first to find the actual surplus, for if we have a num-

Reducing to the L. C. D.:—

Wife, $\frac{12}{48}$

Each tr. pat. grandmother, $\frac{3}{48}$

Each uterine sister, $\frac{4}{48}$

EXAMPLE 11.—Wife, 9 daughters, 6 tr. paternal grandmothers.

Wife, $\frac{1}{8}$

Daughters, $\frac{2}{3}$

Tr. paternal grandmothers, $\frac{1}{6}$

Deducting the wife's share, as she has no return, we have $1-\frac{1}{8}$, or $\frac{7}{8}$, to be divided in the ratio $\frac{2}{3}:\frac{1}{6}$, or 4:1.

Daughters' ultimate share, $\frac{4}{5}$ of $\frac{7}{8}=\frac{7}{10}$; each $\frac{7}{90}$

Tr. paternal grandmothers' ultimate share, $\frac{1}{5}$ of $\frac{7}{8}=\frac{7}{40}$; each $\frac{7}{240}$

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ber $m + n + p$, and $n = a + b$, and we divide p (the actual surplus) in the ratio $a : b$, we get:—

$$\frac{a}{a+b}p, \qquad \frac{b}{a+b}p$$

And if we divide $n + p$ (the whole property less the wife's share) in the same ratio, we get:—

$$\frac{a}{a+b}(n+p), \qquad \frac{b}{a+b}(n+p)$$

but $$\frac{a}{a+b}(n+p) = \frac{an+ap}{a+b}$$

$$= a + \frac{a}{a+b}p$$

Similarly $$\frac{b}{a+b}(n+p) = b + \frac{b}{a+b}p$$

Consequently, the result obtained by dividing the whole property less the wife's share in the ratio of the other shares is the same as that obtained by so dividing the actual surplus and adding the quantities thus obtained to the other shares.

Reducing $\frac{1}{8}$, $\frac{7}{90}$, $\frac{7}{240}$, to the L. C. D., we have:—

Wife, $\frac{90}{720}$

Each daughter, $\frac{56}{720}$

Each tr. paternal grandmother, $\frac{21}{720}$

In the simpler class of cases, where there is no person who is not entitled to partake of the return, the problems may be still more easily solved by merely diminishing the entire number of parts, or L. C. D. of the original shares, so as to make it equal to the aggregate number of parts required. Thus, from Example 6, p. 115, we have:—

Mother, $\frac{1}{6}$

Each daughter, $\frac{1}{3}$, or $\frac{2}{6}$

Therefore, in all,

$\frac{1}{6}$, $\frac{2}{6}$, $\frac{2}{6}$, or $\frac{5}{6}$

Diminishing the L. C. D. to 5, we have $\frac{5}{5}$, and the division will be,

Mother, $\frac{1}{5}$

Each daughter, $\frac{2}{5}$*

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* This simple method may be proved in the same way as the "increase" (*supra*, 111). It occurred to the author, long after the issue of the first edition of this work, from pondering over the words, "The return is the converse of the increase" (Sir. 21; 27).

CHAPTER IX.

OF VESTED INHERITANCES.

When a person who has inherited a portion from another dies before the estate has been distributed, his portion vests at once in his own heirs. Consequently, when the actual distribution is effected, his share or portion must be divided among those entitled to inherit from him, some of whom may be entitled to inherit from the first deceased and some not. It is usual to state the portions of those who ultimately succeed in fractions of the original estate. We shall show how this may be done, by working out an example (slightly altered from Macn. Princ. 181) by means of ordinary arithmetic.

Example.—Wife: *by her*, 2 sons and 2 daughters; wife dies, leaving a father; then one daughter dies, leaving a husband.

Here we have first to consider what would be the portions if the wife and daughter had not died. Re-

membering that the wife is a sharer, and that the children are residuaries, we have:—

Wife, $\frac{1}{8}$

Residue $1-\frac{1}{8}=\frac{7}{8}$, to be divided in the ratio 4:2, or 2:1.

Sons, $\frac{2}{3}$ of $\frac{7}{8}=\frac{7}{12}$; each $\frac{7}{24}$

Daughters, $\frac{1}{3}$ of $\frac{7}{8}=\frac{7}{24}$; each $\frac{7}{48}$

Now the wife dies, leaving her father a sharer, and the four children residuaries.

Wife's father, $\frac{1}{6}$ of $\frac{1}{8}=\frac{1}{48}$

Residue $1-\frac{1}{6}=\frac{5}{6}$, to be divided in the same ratio as the former residue, hence:—

Each son, $\frac{1}{3}$ of $\frac{5}{6}$ of $\frac{1}{8}=\frac{5}{144}$

Each daughter, $\frac{5}{288}$

Adding these to the original portions, we have:—

Each son, $\frac{7}{24}+\frac{5}{144}=\frac{47}{144}$

Each daughter, $\frac{47}{288}$

Lastly, one daughter dies, leaving her husband a sharer, and two sons (her brothers), and a daughter (her sister), residuaries. The wife's father, being a false grandfather of the daughter, takes nothing from her,* as she has heirs living, and a false grandfather is a d. k.

Daughter's husband, $\frac{1}{2}$ of $\frac{47}{288}=\frac{47}{576}$

* In the previous editions of this book, "wife's mother" occurred instead of "wife's father." The author, like Mr. Macnaghten before him, overlooked the circumstance that the wife's mother would be a tr. grandmother of the deceased daughter, and would

Residue $1-\frac{1}{2}=\frac{1}{2}$, to be divided in the ratio 4:1.

Each son, $\frac{2}{5}$ of $\frac{1}{2}$ of $\frac{47}{288}=\frac{47}{1440}$

Daughter, $\frac{47}{2880}$

Adding these to the portions last found, we have:—

Each son, $\frac{47}{144}+\frac{47}{1440}=\frac{517}{1440}$

Daughter, $\frac{47}{288}+\frac{47}{2880}=\frac{517}{2880}$

Reducing $\frac{1}{48}$, $\frac{47}{576}$, $\frac{517}{1440}$, $\frac{517}{2880}$, to the L. C. D., we have:—

Wife's father . . .	$\frac{60}{2880}$
Daughter's husband . .	$\frac{235}{2880}$
Each son	$\frac{1034}{2880}$
Daughter	$\frac{517}{2880}$.

The Sir. is very brief on the subject of vested inheritances, and does not allude to it as affecting the D. K. But the principle involved is assumed, rather than directed by precept, even as regards the heirs, and appears, in fact, to be alluded to merely for the purpose of giving the requisite arithmetical directions for calculating the ultimate shares. The same principle may therefore, it is snbmitted, be safely assumed

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therefore be entitled to $\frac{1}{6}$ of her $\frac{47}{288}$, so as to disturb the ultimate result very considerably. The error was discovered and pointed out by Mr. Alexander C. Tate, a gentleman studying for the Indian Civil Service, to whom the author has much pleasure in tendering his acknowledgments. It is probable that the example was found by Mr. Macnaghten in a correct form in some native treatise, but that the word "mother" was accidentally substituted for "father" in the MS. or the proof sheets of his work.

as to the D. K. so far as it may be found applicable. Thus, if a man leave three sons of different deceased daughters, and one die before distribution, it may be assumed that the survivors, having originally taken each $\frac{1}{3}$, will now take as follows:—

Surviving daughter's sons, each $\frac{1}{3}+\frac{1}{2}$ of $\frac{1}{3}$, or $\frac{1}{2}$

And, in like manner, if the deceased leave two sons of one deceased daughter and two sons of another, and one daughter's son die before distribution, it may be reasonably assumed that the portion of the deceased daughter's son will go to his own brother, as his heir, and not to his cousins, who are only his D. K. Thus, as each daughter's son would originally have had $\frac{1}{4}$, the ultimate portions may be assumed to be:—

Two sons of one daughter, each $\frac{1}{4}$
Surviving son of other daughter, $\frac{1}{4}+\frac{1}{4}$, or $\frac{1}{2}$

The above supposed instances are of a very simple kind; but it seems clear that the principle, if recognized, may lead to problems of a varied and important character.

CHAPTER X.

OF EXCLUSION.

THE broad rules which distinguish sharers from residuaries and regulate the shares of the former are supplemented and modified by certain regulations, giving a preference to some persons over others, which are called rules of "exclusion." It will readily be seen that, without such rules, innumerable relations in very different degrees might all inherit together. The parents, children, husband, and wife,* are not liable to exclusion under any circumstances.

There are two general rules of exclusion laid down

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* Sir. 13; 15.—It will be remembered that when there are sons the daughters are not sharers. This, however, and similar cases are not cases of exclusion, as the females become, *ipso facto*, residuaries.

in the Sir. The first is, that whoever is related to the deceased through any person shall not inherit while that person is living. Thus, for instance, a true grandfather is excluded, both as sharer and as residuary, by the father; a brother, sister, C. brother, or C. sister, is also excluded by the father; a son's son or son's daughter is excluded by the intermediate son.* To this rule there are, however, these important exceptions, that brothers, sisters, U. brothers, and U. sisters, are not excluded by the mother.†

The second of these rules is, that "the nearest of blood must take"; and by "nearest of blood" is meant a relation of the whole blood as distinguished from a relation by the father only.‡ Thus, a brother excludes

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* Sir. 4, 5, 8, 13; 6, 8, 11, 16. As to exclusion by other sons, *vide infra*, 128.

† As to brothers and sisters, *vide* Sir. 8; 11, and *vide* an example, Shar. 82, 83, and *supra*, Chap. VIII., Ex. 3, where a sister is shown to take simultaneously with the mother. As to U. brothers and sisters, *vide* Sir. 13; 16, and *vide* Chap. VIII., Ex. 3. The Sir. gives as a reason in the case of the U. children, that the mother "has no title to the whole inheritance," but this is not a sufficient argument, for the U. children are excluded by a daughter or son's h. l. s. daughter, to whom the same argument, if valid, would apply, Sir. 4; 6. The doctrine, however, is too clearly shown by express precept to be shaken by the want of *à priori* reasons.

‡ Sir. 13; 16, where the reader is directed to the "Chapter on Residuaries" for the explanation of the words "nearest of blood." Referring to that chapter, we find the words: "Then the strength of consanguinity prevails; I mean, he who has two relations is preferable to him who has only one relation, whether it be male or female, according to the saying of Him, on whom be peace!

a C. brother, and a brother's son, pat. uncle's son, father's pat. uncle's son, or father's father's pat. uncle's son, excludes a corresponding C. relation.* And, in like manner, a sister who becomes a residuary by the presence of a daughter excludes a C. brother, notwithstanding her inferiority of sex.† On the other hand, the U. relations are not excluded on account of "blood," and the U. brothers and sisters will therefore take their share, notwithstanding that there be also brothers and sisters of the whole blood.‡

'Surely kinsmen by the same father and mother shall inherit before kinsmen by the same father only.'" It is submitted that for "whether *it* be male or female," we should read, "whether he (or she)," *i.e.* the claimant, not the medium of relationship, "be male or female"; for all the illustrations relate to C. relations, whose "one relation" to, *i.e.* medium of connection with, the deceased, is male; and the quotation from the Prophet bears out the same view. Moreover, U. brothers and sisters, the only U. relations who are among the heirs, are certainly not excluded by the whole blood, as will be shown in our text, so that the rule, as applied to U. relations, is simply inoperative.

* Sir. 10, 11; 13, 14,

† Sir. 10; 13.

‡ Sir. 4, 6. "The mother's children are excluded by children of the deceased and by son's children, how low soever, as well as by the father and the grandfather"—not, be it observed, by brothers or sisters of the whole blood. (For "son's children" we must of course read son's h. l. s. children; as sons' daughters' children or the like would be D. K.; and, similarly, for "grandfather" we must read tr. grandfather.) As to this point, see also *supra*, Chap. VIII., Ex. 3, showing that when there are sisters and U. sisters, the U. sisters take their share, $\frac{1}{3}$, notwithstanding the presence of the sisters.

It must be borne in mind, however, that the second rule is subordinate to the rule which gives to sharers a right to certain definite shares, and, to that extent and no more, a preference over other persons. Thus, sisters, except in the case above mentioned, do not exclude a C. brother, but only take their share, and the C. brother takes the rest as a residuary. Similarly, it (the second rule) does not enable a single sister to claim anything more than her allotted share; thus, if there be one sister, she does not actually exclude a C. sister, but only takes her own $\frac{1}{2}$, and the C. sister takes $\frac{1}{6}$, the remainder of the sisters' portion, $\frac{2}{3}$, after deducting the $\frac{1}{2}$.*

In the application of this rule a question may arise, if there be sisters and C. sisters, and also daughters' or sons' daughters, whether the sisters and C. sisters will be entitled together after payment of the daughters' or sons' daughters' shares, or whether the C. sisters will be excluded. The latter alternative may safely be assumed to be correct, for it has been seen that a sister excludes a C. brother when both are residuaries, and the same principle seems to apply, *à fortiori*, as between sisters and C. sisters when both are residuaries.

A third general rule is, that a person who is himself excluded may exclude another. An illustration of this rule will be seen, *infra*, in the case of true grandmothers. It may be added that such a person may

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* Sir. 2, 7, 8; 2, 9, 10, 11; and *vide supra*, 20.

"exclude imperfectly," *i.e.* cause another to take a smaller share. Thus, two brothers, though themselves excluded by the father, will cause the mother to take $\frac{1}{6}$ instead of $\frac{1}{3}$.* But a person incapable of inheriting cannot, in the opinion of the author of the Sir., exclude another, or even cause him to take a smaller share. Thus, a son who is an infidel will not exclude a brother who is a believer, though he would exclude him if both were believers. On the other hand, Ibnu Masuud maintains that such a person may "exclude imperfectly"; in other words, cause another person to take the smaller instead of the larger share.†

To the above three general rules may be added, in the case of residuaries in their own right, a fourth, which is found in the Chapter on Residuaries in the Sir., namely, that a preference is given on account of proximity of degree; in other words, that the nearer excludes the more remote.‡ Thus, it is clear that a son will exclude the sons of another son, as well as his own; that a son's son h. l. s. will exclude a still lower son's son, even if not descended from himself; that a

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* This is shown by an extract from the Shar. which is not included in Sir W. Jones's "Commentary on the Sirájiyyah." *Vide* Bail, M. L. I., 42.

† *Vide infra*, Chap. XIII., where the subject of persons who may not inherit is treated at greater length.

‡ Sir. 10; 13. "A preference being given, I mean a preference in the right of inheritance, according to proximity of degree." As to the effect of the division into classes on this rule, *vide supra*, 50.

brother's son will exclude a pat. uncle's son, a pat. uncle's son a father's pat. uncle's son, and so on. It must be remembered, however, that this rule is not laid down as to sharers, or as between sharers and residuaries; and we find, accordingly, that a true grandmother is not excluded by a daughter, or a son's daughter by an actual daughter or higher son's daughter*; and that pat. uncles or sons' sons h. l. s. are not excluded by daughters.† It may be further observed that the rule now under consideration is not expressly stated to extend to females who, being primarily sharers, have become residuaries; but their rights are perhaps sufficiently defined by express precept.

Besides the general rules above mentioned, which will account for a great many instances of exclusion, there are several special cases which depend entirely upon authority. These are sometimes at variance with the general rules of exclusion, and sometimes with the rule which places sharers, to the extent of their shares, above residuaries.‡ Thus, a son, or son's son h. l. s., though a residuary, excludes sisters and lower sons' daughters, who,

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* Thus we find, as a case of return, "four wives and nine daughters, and six female ancestors."—Sir. 24; 29. And cases in which a tr. grandmother and a daughter inherit together are also found at Sir. 26, 27; 31, 32; &c. As to a "son's daughter," we know that she takes $\frac{1}{6}$ after the actual daughter has taken $\frac{1}{2}$. *Vide supra*, 19.

† An example of the former combination is found in Sir. 19; 24. For the latter, see the rule of *tashbíb*, *supra*, 37, &c.

‡ *Vide supra*, 11, 12.

in the absence of certain specified relations, are sharers; and a son's son h. l. s. excludes brothers, even though he may be farther removed from the deceased. Under these circumstances it is best to rely on authority whenever it is possible to do so; and, fortunately, the numerous though scattered statements in the Sir., together with some assistance from the above general rules when there is nothing to contravene them, enables us to form the following table, which presents the best known instances:—

Son's son h. l. s., excluded by	.	son, or higher son's son.*
Brother „	.	son, son's son h. l. s., father, or (perhaps) tr. grandfather.†

* Sir. 13; 16. "The son," but the case of *tashbíb*, *supra*, 37, &c., and the rule as to proximity of degree among residuaries, *supra*, 128, show the exclusion by any son, and also by any higher son's son.

† The respective rights of the tr. grandfather and of the brothers, &c., on the supposition of *non*-exclusion, are discussed, *supra*, 29, &c. The author of the Sirájiyyah apparently inclines to the opinion that brothers and sisters and C. brothers and C. sisters are not excluded by the tr. grandfather, for he states positively that they are excluded by the son, son's son, and father, "as it is agreed," and adds the words "and even by the grandfather according to Abú Hanífa," thus appearing to imply that the doctrine of exclusion by the grandfather is not generally approved. *Vide* Sir. 8; 11. It is true that in another place he states that Abubecr the Just and his followers adhere to the opinion of Abú Hanífa, and that "judgments are given conformably to it," *vide* Sir. 24; 29; but in the same passage he cites five authorities, including the celebrated names of Abu Yusuf and Muhammed, against the view of Abú Hanífa. Upon the

Sister	excluded by .	same as brother.
C. Brother	,, .	same as brother, or brother, or sister when a residuary with another female.
C. sister	,, .	same as brother, or two or more sisters, or brother, or, *semble*, sister when, &c.
Son's h. l. s. daughter	,, .	two daughters or higher son's daughters, son, or higher son's son.*
U. brother	,, .	child, son's h. l. s. child, father, or tr. grandfather.

whole, therefore, it may be fairly concluded that he thought the balance of authority to be against that view. We find also in the Shar., in relation to the same subject, the words "as the best lawyers agree, dissenting on this point from their master Abú Hanífah," (Shar. 67), which seems to show that either Sharíf or his translator considered the point to be settled against the doctrine of Abú Haníf a. But, later in the same work, Sir William Jones tells us that "the dispute is now settled among the Sunnis according to the opinion of Abú Haníf a" (Shar. 90); and it is said that the same doctrine is approved in the Durr-ul-Mukhtar and Fatáwá Alamgiri. (*Vide* Tag. Lect., 1873; 97, 108, 109.) It seems probable, therefore, that the doctrine of exclusion by the tr. grandfather may be the correct one at the present day; but, on a point of such importance, as to which there exists so serious a conflict of opinion, the author feels that his duty can only be properly discharged by stating, as far as possible at present, the arguments and authorities on both sides.

* Sir. 5; 8.—"The son himself"; but it is clear that this extends to *any* son or higher son's son. *Vide* case of *tashbíb*, *supra*, 37, &c.

U. sister	excluded by	. same as U. brother.
Tr. grandfather	,,	. father, or nearer tr. grandfather.*
Tr. pat. grandmother	,,	. father, mother, intermediate tr. grandfather, or nearer tr. grandmother (even though in a different line).
Tr. mat. grandmother	,,	. mother, or nearer tr. grandmother (even though in a different line).

The fact that a nearer grandmother in one line may exclude a more distant grandmother even in another line, leads to this curious result, that a grandmother who is herself excluded may exclude another.† Thus, the father's mother, though herself excluded by the father, will exclude the mother's mother's mother, so that the father will take the whole.‡ The result of this

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* Sir. 4; 6.—"The father"; but obviously a nearer tr. grandfather also, on account of his "proximity of degree," and also on account of his being the "mean of consanguinity."

† Sir. 9; 12. Shar. 74, 75.

‡ The author has thought it best to confine the word "exclusion" to its natural sense of *total* exclusion. In order, however, to save the reader from confusion, it may be well to remind him that in the Sir. the word is used in a wider sense. Thus, the husband, wife, mother, &c. are considered liable to *imperfect* exclusion (Sir. 13; 15), which occurs whenever, by the presence

rule may sometimes be rather surprising, for the father, standing alone with the mother's mother's mother, would take only $\frac{5}{6}$, but her exclusion by the father's mother gives him the whole. A similar anomaly cannot occur in the case of the mother, for she herself (as seen in the table) excludes the true grandmothers in all lines; but it may, of course, take place in a higher generation, *e.g.* the father's father's mother, though herself excluded by the father or father's father, would exclude the mother's mother's mother's mother, to the advantage of the father or father's father, as the case might be.

It will be observed that the tr. pat. grandmother is stated in our text to be excluded by the "intermediate" tr. grandfather; but it seems quite open to argument that she is excluded by a nearer tr. grandfather even if not intermediate, *e.g.* that the father's father's mother's mother would be excluded by the father's father's father. The reader is recommended, however, to peruse carefully the passage (Sir. 8, 9; 12) in which the doctrine of the exclusion of tr. grandmothers is declared, and he will probably come to the conclusion, in common with ourselves, that as the father's mother "even in the highest degree" "takes with the grandfather" (*i.e.* her own husband), "since she is not related through him," so will any tr. pat. grandmother be entitled

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of certain other near relations, they are deprived of a larger share, and obliged to be contented with a smaller. The instances of this partial deprivation are enumerated in the Table of Sharers, *supra*, 17, &c.

to take in the presence of any tr. grandfather except a tr. grandfather through whom she is related to the deceased.

The chapter on Exclusion in the Sir. is placed considerably earlier than the chapters on the D. K.; and, as the subjects of proximity of degree, strength of blood, &c. are separately dealt with in those chapters, it may be presumed that the chapter on Exclusion is not meant to have any application to the D. K.

CHAPTER XI.

MISCELLANEOUS EXAMPLES ON SHARERS AND RESIDUARIES.*

We subjoin a few miscellaneous examples, of which the greater part are taken almost at random from the large mass of precedents of inheritance in Macnaghten's "Principles and Precedents," in order to show the general applicability of the arithmetical methods which we have used above. The reader will find that the results here arrived at coincide with those stated by the native law officers consulted in the several cases.

Example 1.—Wife, mother, and sister.

Wife	$\frac{1}{4}$
Mother	$\frac{1}{3}$
Sister	$\frac{1}{2}$

* Although the D. K. are occasionally referred to in these examples, the allusion to them is so slight that the above title will not, it is hoped, seem inappropriate.

But $\frac{1}{4}+\frac{1}{3}+\frac{1}{2}=\frac{3}{12}+\frac{4}{12}+\frac{6}{12}=\frac{13}{12}$, or more than the whole. The doctrine of the increase therefore applies, and the property must be divided into 13 instead of 12. Hence we have:—

Wife	$\frac{3}{13}$
Mother	$\frac{4}{13}$
Sister	$\frac{6}{13}$

EXAMPLE 2.—Three sons, two daughters, son's son, and wife.

The son's son has nothing, being excluded by the sons; wife, $\frac{1}{8}$.

Residue $1-\frac{1}{8}=\frac{7}{8}$. This must be divided in the proportion 6 : 2, or 3 : 1 (since the sons, as compared with the daughters, take double shares). Hence we have:—

Sons, $\frac{3}{4}$ of $\frac{7}{8}=\frac{21}{32}$; each $\frac{7}{32}$

Daughters, $\frac{1}{4}$ of $\frac{7}{8}=\frac{7}{32}$; each $\frac{7}{64}$

Reducing $\frac{1}{8}$, $\frac{7}{32}$, $\frac{7}{64}$, to the L. C. D., we have:—

Wife	$\frac{8}{64}$
Each son	$\frac{14}{64}$
Each daughter . . .	$\frac{7}{64}$

EXAMPLE 3.—Wife, mother, and two sons.

Wife	$\frac{1}{8}$
Mother	$\frac{1}{6}$

Residue, $1-\frac{1}{8}-\frac{1}{6}=1-\frac{7}{24}=\frac{17}{24}$

Each son	$\frac{17}{48}$

Reducing $\frac{1}{8}$, $\frac{1}{6}$, $\frac{17}{48}$, to the L. C. D., we have:—

Wife	$\frac{6}{48}$
Mother	$\frac{8}{48}$
Each son	$\frac{17}{48}$

EXAMPLE 4.—Wife, four brothers' sons, sister, and uncle's son.

Wife	$\frac{1}{4}$
Sister	$\frac{1}{2}$

Uncle's son excluded by brothers' sons.

Residue $1-\frac{1}{4}-\frac{1}{2}=1-\frac{3}{4}=\frac{1}{4}$, $\therefore$ each brother's son $\frac{1}{16}$

Reducing $\frac{1}{4}$, $\frac{1}{2}$, $\frac{1}{16}$, to the L. C. D., we have:—

Wife	$\frac{4}{16}$
Sister	$\frac{8}{16}$
Each brother's son . . .	$\frac{1}{16}$

EXAMPLE 5.—Three wives, six sons, six daughters.

Wives, $\frac{1}{8}$, $\therefore$ each $\frac{1}{24}$

Residue $1-\frac{1}{8}=\frac{7}{8}$; to be divided in the ratio 12:6, or 2:1. Hence we have:—

Sons, $\frac{2}{3}$ of $\frac{7}{8}=\frac{7}{12}$, $\therefore$ each $\frac{7}{72}$

Daughters, $\frac{1}{3}$ of $\frac{7}{8}=\frac{7}{24}$, each $\frac{7}{144}$

Reducing $\frac{1}{24}$, $\frac{7}{72}$, $\frac{7}{144}$, to the L. C. D., we have:—

Each wife	$\frac{6}{144}$
Each son	$\frac{14}{144}$
Each daughter . . .	$\frac{7}{144}$

EXAMPLE 6.—Wife; *by her*, three sons B. C. D., and two daughters E. F.; *by another wife*, a daughter G.;

before distribution, the wife, B., C., and G. die successively. This is a case of vested "inheritance."

Wife . . . . . $\frac{1}{8}$

Residue $1-\frac{1}{8}=\frac{7}{8}$, to be divided in the ratio 6 : 3, or 2 : 1.

Sons, $\frac{2}{3}$ of $\frac{7}{8}=\frac{7}{12}$; each $\frac{7}{36}$
Daughters, each $\frac{7}{72}$

Now the wife dies, and her share is divided among her own sons and daughters (G. is not her daughter and takes nothing from her) in the ratio 6 : 2 or 3 : 1. Hence we have:—

Sons, $\frac{3}{4}$ of $\frac{1}{8}=\frac{3}{32}$; each $\frac{1}{32}$
E. and F., each $\frac{1}{64}$

Hence, adding these to the original shares:—

Sons, each $\frac{7}{36}+\frac{1}{32}=\frac{65}{288}$
E. and F., each $\frac{65}{576}$
G. (as before), $\frac{7}{72}$

Next the son B. dies; G., being a C. sister, is excluded by the actual brothers, and B.'s portion is divided between C. D. and E. F. in the ratio 4 : 2, or 2 : 1. Hence:—

C. D., $\frac{2}{3}$ of $\frac{65}{288}=\frac{65}{432}$; each $\frac{65}{864}$
E. F., each $\frac{65}{1728}$

Adding these to the portions last found, we have:—

C. D., each $\frac{65}{288}+\frac{65}{864}=\frac{260}{864}=\frac{65}{216}$
E. F., each $\frac{65}{432}$
G. (as before), $\frac{7}{72}$

Afterwards C. dies, and his portion goes to D. and E. F. in the ratio 2:2, or 1:1. Hence:—

D., $\frac{1}{2}$ of $\frac{65}{216}=\frac{65}{432}$
E. F., each $\frac{65}{864}$

Adding as before:—

D., $\frac{65}{216}+\frac{65}{432}=\frac{195}{432}=\frac{65}{144}$
E. F., each $\frac{65}{288}$
G. (as before), $\frac{7}{72}$

Lastly, G. dies, and as she has no brothers or sisters of the whole blood, her portion is divided between D. E. and F. The ratio is again 2:2, or 1:1, and we get:—

D., $\frac{1}{2}$ of $\frac{7}{72}=\frac{7}{144}$
E. F., each $\frac{7}{288}$

Adding, as before:—

D., $\frac{65}{144}+\frac{7}{144}=\frac{72}{144}=\frac{1}{2}$
E. F.,* each $=\frac{72}{288}=\frac{1}{4}$

Reducing $\frac{1}{2}$, $\frac{1}{4}$, to the L. C. D., we have D. $\frac{2}{4}$, E. F. each $\frac{1}{4}$. The fractions thus obtained are identical with those given in Macnaghten; where, however,

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* In order to economise space, we have omitted, throughout this example, the actual calculation of the daughters' portions; but the reader can easily work them out, and will find that at each stage they come out as we have given them, *i.e.* each daughter's portion exactly half of each son's portion. In this case the ultimate result might have been easily foreseen, but we have thought it desirable to work it out, as this is one of the most elaborate cases of vested inheritance given by Macnaghten.

they are expressed in the more bulky form of $\frac{864}{1728}$, $\frac{432}{1728}$, for, as we have observed elsewhere, the old Arabian methods provide no rule for reducing fractions to lower terms.*

EXAMPLE 7.—Mother, wife, and daughters of U. brother.

Mother	$\frac{1}{3}$
Wife	$\frac{1}{4}$

The U. brothers' children are distant kindred, and consequently, as there are sharers, they take nothing. But $\frac{1}{3}$ and $\frac{1}{4}$ do not exhaust the whole; therefore, this is a case of return; and, as a wife cannot partake in the return, the mother will get, after payment of the wife's share, all. Hence we have, finally:—

Mother	$\frac{3}{4}$
Wife	$\frac{1}{4}$

EXAMPLE 8.—Husband, mother, and daughter *by former husband;* husband dies before distribution, leaving wife, mother, and father; daughter dies after husband, also before distribution, leaving mother's mother (identical, of course, with the mother of the proposita),†

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* *Vide supra*, 83, note.

† Sir. 27; 32. Shar. 91. The author much regrets that, having overlooked the fact that the daughter's mother was identical with the mother of the proposita, he worked out the later stages of this question erroneously in "Al Sirájiyyah reprinted." He would have taken an earlier opportunity of correcting this error, but unfortunately he did not discover it till after the second edition of this work was published.

two sons, and daughter. Afterwards, still before distribution, mother (daughter's mother's mother) dies, leaving husband and two brothers. This is a case of vested inheritance.

Husband . . . . . $\frac{1}{4}$
Mother . . . . . $\frac{1}{6}$
Daughter . . . . . $\frac{1}{2}$

But these fractions do not exhaust the whole, therefore this is a case of return; and, as a husband cannot partake in the return, we have $\frac{1}{12}$ to be divided in the ratio $\frac{1}{6}:\frac{1}{2}$, or 1:3, and added to the mother's and daughter's shares, so that we get:—

Mother, $\frac{1}{6}+\frac{1}{4}$ of $\frac{1}{12}$, or $\frac{3}{16}$
Daughter, $\frac{1}{2}+\frac{3}{4}$ of $\frac{1}{12}$, or $\frac{9}{16}$

Now the husband dies, and we have:—

Mother and daughter as before.
Husband's wife, $\frac{1}{4}$ of $\frac{1}{4}=\frac{1}{16}$
Husband's mother, $\frac{1}{3}$ of $(\frac{1}{4}-\frac{1}{16})$, or $\frac{1}{16}$
Husband's father,* $\frac{1}{4}-\frac{2}{16}$, or $\frac{1}{8}$

Afterwards the daughter dies, and we have:—

Husband's heirs as before.
Mother (the daughter's mother's mother), $\frac{3}{16}$†$+\frac{1}{6}$ of $\frac{9}{16}$, or $\frac{9}{32}$
Daughter's sons, each $\frac{2}{5}$ of $\frac{5}{6}$ of $\frac{9}{16}$, or $\frac{3}{16}$
Daughter's daughter, $\frac{1}{5}$ of $\frac{5}{6}$ of $\frac{9}{16}$, or $\frac{3}{32}$

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* The father, it will be remembered, takes all that is left after the other shares when there are no children, *vide supra*, 26.

† This is the mother's share directly from the *proposita*, as ascertained above.

Lastly, the mother dies, and we have:—

Husband's heirs and daughter's sons and daughter as before.

Mother's husband, $\frac{1}{2}$ of $\frac{9}{32}$, or $\frac{9}{64}$

Mother's brothers, each $\frac{1}{2}$ of $\frac{9}{64}$, or $\frac{9}{128}$

Reducing the fractions to the L. C. D., we have:—

Husband's wife . . .	$\frac{8}{128}$
Husband's mother . . .	$\frac{8}{128}$
Husband's father . . .	$\frac{16}{128}$
Daughter's sons, each . .	$\frac{24}{128}$
Daughter's daughter . .	$\frac{12}{128}$
Mother's husband . . .	$\frac{18}{128}$
Mother's brothers, each . .	$\frac{9}{128}$

CHAPTER XII.

EXAMPLES FOR PRACTICE ON SHARERS AND RESIDUARIES.*

In this, as in our second edition, we have thought it desirable to add a few Examples *not worked out*, in order to stimulate the industry and exercise the ingenuity of the student. These "Examples for Practice" are all taken from the opinions of native law officers recorded in reported cases, with the exception of one or two which have been selected from the Sirájiyyah. The reader must expect to meet with "return," "increase," or some other special feature, in almost every case; for it is rare, in actual practice, to find the simple instances which theoretical instruction provides as a kind of tender fare for the young beginner. With this warning, we commend the "Examples for Practice" to our

* See Note on title of Chap. XI., which is also applicable to the title of this Chapter.

readers, who, with a thorough knowledge of the preceding part of the book, and a resolute determination not to be beaten, will be sure to be able to give a good account of them.*

EXAMPLE 1.—Husband, father, mother.

Answer.—Husband, $\frac{1}{2}$; father, $\frac{1}{3}$; mother, $\frac{1}{6}$;

(or, $\frac{3}{6}$; $\frac{2}{6}$; $\frac{1}{6}$).

EXAMPLE 2.—Son, daughter. The daughter dies, and leaves a son, Fuseehoodeen. Fuseehoodeen dies, and leaves a son, Ali, and a daughter, Wajida. Ali dies. What portion of the original estate does Wajida take?

Answer.—$\frac{1}{3}$.

EXAMPLE 3.—Wife, brother, mother. Mother dies.

Answer.—Wife, $\frac{1}{4}$; brother, $\frac{3}{4}$;

(or, $\frac{3}{12}$; $\frac{9}{12}$).

EXAMPLE 4.—Wife, son *by her*, wife's mother, son of half-brother.† Son dies.

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* It may be as well to mention that the author has worked out all these examples more than once by the rules of European Arithmetic, and that the results in every instance coincide with those given by the native law officers.

† This must, of course, be a half-brother by the father's side, or C. brother. The reader will remember that the U. brother's son is a. d. k., and would therefore take nothing in the presence of the wife and son.

Answer.—Wife, $\frac{5}{12}$; son of half-brother, $\frac{7}{12}$;

(or, $\frac{10}{24}$; $\frac{14}{24}$).

EXAMPLE 5.—Two sons, Husun Ali and Himmut Ali, mother, wife Zeinub, the mother of Himmut Ali. Another wife, Zeb-oon-nissa, mother of Husun Ali, and after her, Aloo Thakoor, another son of *propositus* by her, have died before *propositus*. Zeb-oon-nissa's dower* absorbed the whole estate.

Answer.—First: On Zeb-oon-nissa's death *propositus* (her husband), $\frac{1}{4}$; sons Husun Ali and Aloo Thakoor, each $\frac{3}{8}$. Secondly: On Aloo Thakoor's death, his $\frac{3}{8}$ go to *propositus*, who therefore has $\frac{5}{8}$. Thirdly: On the death of propositus, the $\frac{5}{8}$ which have come to him will be distributed thus:—mother, $\frac{1}{6}$; wife Zeinub, $\frac{1}{8}$; sons Husun Ali and Himmut Ali, each $\frac{17}{48}$; and the ultimate fractions of the original estate will be (remembering that Husun Ali has $\frac{3}{8}$ already), mother, $\frac{40}{384}$; wife Zeinub, $\frac{30}{384}$; son Husun Ali, $\frac{229}{384}$; son Himmut Ali, $\frac{85}{384}$.

EXAMPLE 6.—Husband, daughter, brother, three sisters.†

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* The dower of a wife may be fixed at any amount, however large; and if it should be so large as to absorb the whole estate, it excludes the inheritors, as it is held to be a debt. It descends in the same way as other property; and, consequently, the husband, the very person from whom it is derived, will take his share as an heir if his wife dies before him. The present example affords an instance of that contingency.

† This example (as far as it goes) affords an illustration of the doctrine maintained *supra*, 43, that when there are brothers

Answer.—Husband, $\frac{1}{4}$; daughter, $\frac{1}{2}$; brother, $\frac{1}{10}$; sisters, each $\frac{1}{20}$ (or $\frac{5}{20}$, $\frac{10}{20}$, $\frac{2}{20}$, $\frac{1}{20}$).

EXAMPLE 7.—Wife, son *by her*, mother, brother. Son dies, then mother dies.

Answer.—Wife, $\frac{13}{36}$; brother, $\frac{23}{36}$ (or $\frac{26}{72}$, $\frac{46}{72}$).

EXAMPLE 8.—Son, two daughters, Misree Khanum and Janee Khanum, both married to Moohummud Tukee. Son dies. Misree Khanum dies, leaving two sons, Ali Nukee and Husun Uskuree. Janee Khanum dies. Lastly, Husun Uskuree dies.*

Answer.—Moohummud Tukee, $\frac{11}{16}$; Ali Nukee, $\frac{5}{16}$.

EXAMPLE 9.—Two wives, daughter. One wife, leaving *her* daughter's son, who is *not* descended from the *propositus*, dies. The other wife, the mother of the above-mentioned daughter of *propositus*, dies.

Answer.—Wife's daughter's son, $\frac{1}{16}$; daughter, $\frac{15}{16}$.

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and sisters and also daughters, the brothers and sisters will take the residue after payment of the daughters' shares, each brother taking a double share.

* This example presents the singular feature of two sisters married to the same man. One sister dies, leaving two sons; the other dies after her, childless, The second sister's property, after the husband has taken half (the lady herself being childless), goes equally between the two sons, as her sister's children, and therefore her own D. K. As her step-children they could, of course, take nothing from her, being, in that character, neither sharers, residuaries, nor distant kindred. It will be observed that this example illustrates the doctrine that a husband has no return (*supra*, Chap. VIII.) in a striking manner, the D. K. of Janee Khanum taking what remains after payment of her husband's share.

EXAMPLE 10.—Two wives, mother, son. Mother dies. One wife, the mother of the son, dies.

Answer.—Surviving wife, $\frac{1}{16}$; son, $\frac{15}{16}$ (or $\frac{3}{48}$, $\frac{45}{48}$).

EXAMPLE 11.—Wife, two daughters, son (missing).

Answer.—Wife, $\frac{1}{8}$; daughters, each $\frac{7}{16}$; but the missing son's part, $\frac{7}{16}$, to be restored to him if he returns, each daughter giving up $\frac{7}{32}$; (or $\frac{4}{32}$, $\frac{14}{32}$; but, if son returns, $\frac{4}{32}$, $\frac{7}{32}$, $\frac{14}{32}$).

EXAMPLE 12.—Wife,* two sons, four daughters. One of the sons dies, leaving three sons, *i.e.* son's sons of the *propositus*.

Wife, $\frac{1}{8}$; son, $\frac{7}{32}$; each daughter, $\frac{7}{64}$; each son's son, $\frac{7}{96}$;

(or, $\frac{24}{192}$; $\frac{42}{192}$; $\frac{21}{192}$; $\frac{14}{192}$).

EXAMPLE 13.—Mother, wife Zuhooroonissa and two other wives, daughter Fyzoonissa (being the daughter of Zuhooroonissa), and two other daughters, brother. Daughter Fyzoonissa dies.

Answer.—Mother, $\frac{1}{6}$; wife Zuhooroonissa, $\frac{17}{216}$; other wives, each $\frac{1}{24}$; surviving daughters, each $\frac{8}{27}$; brother, $\frac{17}{216}$;

(or, $\frac{36}{216}$; $\frac{17}{216}$; $\frac{9}{216}$; $\frac{64}{216}$; $\frac{17}{216}$).

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* It must be assumed that she is not mother of the son who dies, for, if she were, she would partake of his estate.

EXAMPLE 14.—Wife (being father's brother's daughter, or first cousin, of her husband), son, daughter, brother. Son dies; daughter dies, leaving husband, son, and daughter; wife dies, leaving father's brother's son (the brother above mentioned of the propositus); daughter's son dies; brother dies, leaving son; daughter's husband dies, leaving daughter, (the daughter's daughter above mentioned).*

Answer.—Daughter's daughter, $\frac{35}{72}$; brother's son, $\frac{37}{72}$;

(or, $\frac{210}{432}$; $\frac{222}{432}$).

EXAMPLE 15.—Wife, *by her*, son Enayut Hosein and daughter, son by a previously deceased wife. Daughter dies, leaving a son and two daughters; wife dies.

Answer.—Son Enayut Hosein, $\frac{121}{240}$; other son, $\frac{7}{20}$; daughter's son, $\frac{7}{96}$; daughter's daughters, each $\frac{7}{192}$;

(or, $\frac{484}{960}$; $\frac{336}{960}$; $\frac{70}{960}$; $\frac{35}{960}$).

EXAMPLE 16.—Four wives, nine daughters, six true grandmothers.

Answer.—Wives (each), $\frac{1}{32}$; daughters (each), $\frac{7}{90}$; true grandmothers (each), $\frac{7}{240}$;

(or, $\frac{45}{1440}$; $\frac{112}{1440}$; $\frac{42}{1440}$).

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* In this example it must be assumed that the wife is the mother of the son and daughter, and that the daughter's husband is the father of the daughter's son and daughter's daughter.

CHAPTER XIII.

SPECIAL RIGHTS AND DISABILITIES.

Posthumous Children, 150.—Hermaphrodites, 153.—Lost or Missing Persons (*in hâc*, Believing Captives), 158.—Persons Dying Together, 161.—Inheritance by other Titles than Relationship or Marriage, 162.—Acknowledgment of Person as Brother by Son, 180.—Acknowledgment of Person as Son, *ibid.*—Persons who may not Inherit, 181.—Rights taking precedence of Inheritance, 188.—Acknowledgment of Debt by Inheritor, 193.—Composition of Inheritance, 194.—Decrees of the Kazee, 198.

In this chapter we propose to deal with the various outlying points above mentioned, which could not be brought conveniently within any of the previous divisions of our subject, but which are so intimately connected with it as to merit a brief notice in such a treatise as that on which we are engaged.

POSTHUMOUS CHILDREN.—If a man die, leaving a widow, a period of probation called her edit of widowhood has to elapse before it is lawful for her to marry again, or to have carnal connection. In the case of a free woman this period lasts (generally) four months and ten days; in the case of a slave, two months and five days. But if a woman is pregnant at the time of her husband's death, the edit does not expire till the birth of the child.* If a widow confess having broken her edit, a child born of her after her husband's decease cannot inherit from him. But if she do not confess having broken it, the child will inherit from the deceased husband, and others from the child, provided that it is born within the longest possible period of gestation.† This period is, according to the more approved and also more reasonable opinion, fixed at two years.‡ On the other hand, if the deceased be not the child's father, but some other relation, the child will inherit if born in six months or less after the death, but not otherwise, six months being the shortest period of gestation.§

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* Hed. iv. xii. 1, 6, 12, 15, &c.; Shar. 100. The reader is referred to the Hed. for the subject of edit generally.

† Sir. 45; 51, where it is stated that if she have *not* confessed, &c., the child will inherit, so that the converse may be inferred as here stated.

‡ Sir. 44; 49, 50. Hed. iv. xii. 12; iv. xiii. 5. The author of the Sir. does not express any preference, but he records the fact that Abu Hanifa adheres to the more moderate view. Other old authorities give three, four, and even seven years!

§ Sir. 44, 45; 50, 51; and *vide* Hed. iv. xii. 12.

It is laid down that if a wife be pregnant at the time of the death of the husband, or any other person from whom a child, if born, would inherit, a portion of the inheritance must be reserved (or security taken for such portion) in favour of the unborn child or children; but the older authorities differ very much as to the quantity, Abu Hanifa saying that the portion of four sons or four daughters (whichever is the larger) must be reserved; another authority, the portion of three sons or three daughters (whichever is the larger); another the portion of two sons; and another, the portion of one son or of one daughter. The last opinion might be supposed to be that of the author of the Sir., as he says that "decisions are made" in accordance with it; but in practice he adopts the view of Abu Hanifa, as will be seen in an example given by him and worked out *infra*.*

As a posthumous child, if born alive, not only itself inherits, but may be the medium of inheritance to others, and as (it is perhaps scarcely necessary to add) a child born dead is not considered to be born at all, it is important to know what are the rules for ascertaining whether a child is actually born alive or not.† The

* Sir. 47; 53; "since the part reserved," &c., and *vide infra*, Chap. XIV., Ex. 2.

† Suppose, for instance, that a man were to leave a wife and a brother. If a posthumous son were to be born, and then to die, the wife, it will readily be seen, would have (as wife) $\frac{1}{8}$, and (as mother of the child) $\frac{1}{3}$ of $\frac{7}{8}$, total, $\frac{8}{24}$, and the brother would have the residue, $\frac{7}{24}$; but if the child were born dead, the mother would have $\frac{1}{4}$, and the brother the residue, $\frac{3}{4}$.

following rules are laid down in the Sir. for determining this important question:—

"Now the way of knowing the life of a child at the time of its birth, is, that there be found in him that, by which life is proved; as a voice, or sneezing, or weeping, or smiling, or moving a limb; and, if the smallest *part* of the child come out, and he then die, he shall not inherit; but if the greater *part* of him come out, and then he die, he shall inherit: and, if he come out straight (*or with his head first*), then his breast is considered; I mean, if his whole breast come out, he shall inherit; but if he come out inverted (*or with his feet first*) then his navel is considered."*

Examples of the reservation of a portion for posthumous children, and its subsequent distribution according to various events, are given below.†

In working out cases of this description the reader must remember that it is necessary to provide for the largest claim that can arise, and, consequently, the object is first to ascertain what are the smallest portions that the living claimants can have, and to allot those as provisional portions, while all that remains is treated as the reserved portion. The manner in which this may be effected will be understood from the working of the examples, and it will also be seen how the reserved portion is to be dealt with in the various events that may arise; any part of it that is not required for posthumous children

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* Sir. 45; 51.

† *Infra*, Chap. XIV., Ex. 1, 2.

being restored to the original claimants according to their respective rights.

HERMAPHRODITES.—A *khoonsa*, or hermaphrodite, is defined as a person having the generative organs of both sexes. The Moohummudan law divides such persons into three classes, those in whom distinguishing tokens of manhood appear alone or preponderate, those in whom distinguishing tokens of womanhood appear alone or preponderate, and those in whom neither appear or both appear equally. The first sort are accounted males, the second females, the third are called "equivocal" or "ambiguous" hermaphrodites, or hermaphrodites "whose sex is quite doubtful." It is only with the last sort that we have to deal here; but it is important to remember that a hermaphrodite of doubtful sex during infancy will, if distinguishing tokens appear when it arrives at maturity, be considered to be a male or a female as the case may be.*

According to Abu Hanifa, an equivocal hermaphrodite takes the same portion as a male or a female on the same level, and if there be no such male or female,

* Hed. liii., "Section i." 1, 2; "Section ii." 10. Sir. 42; 48. The Hedaya gives minute details as to the tests to be applied in order to distinguish the sex, first, in early age, and afterwards, at the age of maturity. As, however, these tests are given, to a great extent, merely *exempli gratia*, and as the court, if a case should arise, would doubtless have to decide on the whole evidence of every description, it is not necessary to repeat these details here. The reader who desires to know what they are can refer to Hed. liii., "Section i." 1, 2.

the same that would be taken by such male or female, if any, whichever is the smaller under the particular circumstances of the case; his reason being, that the right to the smaller portion is unquestionable, while the right to anything more is doubtful.* Thus, if there be a son, a daughter, and an equivocal hermaphrodite child, the hermaphrodite will take $\frac{1}{4}$, as if it were a daughter, and not $\frac{2}{5}$, as if it were a son†; and, similarly, if there be a son and an equivocal hermaphrodite child, but no daughter, the hermaphrodite will take $\frac{1}{3}$, and not $\frac{1}{2}$.‡ Thus, also, if a woman leave a husband, a mother, and an equivocal hermaphrodite brother or sister, the hermaphrodite will take the residue, $\frac{1}{6}$, after payment of the shares, $\frac{1}{2}$ and $\frac{1}{3}$, as if it were a brother, and not $\frac{1}{2}$, as if it were a sister.§ And, on the same principle, if a man leave a wife, two U. brothers, and an equivocal hermaphrodite brother or sister, the wife will take her share, $\frac{1}{4}$, the U. brothers their share, $\frac{1}{3}$, and the hermaphrodite will take the residue, $\frac{5}{12}$.‖

The Sir. and Hed. record also another doctrine,

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* Hed. liii., "Section ii." 10; Sir. 42; 48. The Hedaya bases this doctrine on a general principle of law, that where a doubt exists with respect to a right in property, "the unquestionable proportion only should be decreed."

† Sir. *ibid.* Hed. *ibid.*

‡ Hed. *ibid.*

§ Hed. *ibid.* If the hermaphrodite counted as a sister, it is easily seen that it would be a case of increase, and the $\frac{1}{2}$ would become $\frac{3}{8}$, which would be more than $\frac{1}{6}$.

‖ Hed. *ibid.*

namely, that the equivocal hermaphrodite takes "a moiety of the two shares in the controversy"; and Abu Yusuf and Muhammed both accept this doctrine. They differ, however, materially, as to its construction, and their respective views afford a remarkable instance of the subtlety of reasoning which is frequently conspicuous in the controversial argument of the Arabian lawyers.

The difference of opinion arises on the construction of the words "the two shares in the controversy"; the former maintaining that the two shares in question are the portions which the hermaphrodite would take if put, hypothetically, first in the place of one of the actual males on the same level, and, secondly, in the place of one of the actual females on the same level; and the latter, that they are the portions of the hermaphrodite on the two suppositions of its being first a male, and secondly a female, inheriting together with all the actual males and females on the same level.

If, therefore, there be a son, a daughter, and an equivocal hermaphrodite child, according to Abu Yusuf, the "two shares" will be $\frac{2}{3}$ and $\frac{1}{3}$, the former being the portion which it would take if put in the place of the son, and the latter the portion which it would take if put in the place of the daughter, and the moiety will be $\frac{1}{2}$, so that the shares of the three claimants will be $\frac{2}{3}$, $\frac{1}{3}$, $\frac{1}{2}$; but $\frac{2}{3}+\frac{1}{3}+\frac{1}{2}=\frac{4}{6}+\frac{2}{6}+\frac{3}{6}$, or $\frac{9}{6}$, so that it is a case of increase; and the denominator must be increased to 9, so that the hermaphrodite will get $\frac{3}{9}$ or $\frac{1}{3}$. And it will readily be seen that, as the portion of a male is (generally) double that of a female on the same level of

relationship, we may, in ordinary cases, ascertain $\frac{3}{4}$ of the former or $\frac{3}{2}$ of the latter, instead of finding half the sum of the two portions; for, if x be the portion of a male, and y that of a female,

$$x=2y, \text{ and } y=\tfrac{1}{2}x$$
$$\therefore \tfrac{1}{2}(x+y)=\tfrac{1}{2}(x+\tfrac{1}{2}x)=\tfrac{3}{4}x$$
$$\text{And } \tfrac{1}{2}(x+y)=\tfrac{1}{2}(2y+y)=\tfrac{3}{2}y$$

Or, we may ascertain the portion of a female, and add to it a quarter of the portion of a male, or half the portion of a female,* for

$$\tfrac{1}{2}(x+y)=\tfrac{1}{2}(2y+\tfrac{1}{2}x)=y+\tfrac{1}{4}x \text{ or } y+\tfrac{1}{2}y$$

Hence, according to the same authority, if there be one male and no female, since the hermaphrodite, put in the place of the male, would take the whole, he will, in fact, primarily take $\frac{3}{4}$. And, it may be presumed, if there be one female and no male, as the hermaphrodite, put in the place of the female, would take $\frac{1}{2}$, he will now take, primarily, $\frac{3}{2}$ of $\frac{1}{2}$, or $\frac{3}{4}$. If the hermaphrodite stand alone, *i.e.* without any male or female on the same level, he still takes $\frac{3}{4}$, that being half of the whole estate, which he would take if a male, together with half of $\frac{1}{2}$, which he would take if a female.

According to Muhammed, on the other hand, if we

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* This, having regard to the context, is evidently what is meant by the words "he takes the moiety which is ascertained, together with half the moiety which is disputed" (Sir. 43; 48); the "moiety" in each case being the portion of a female, *i.e.* a moiety of the portion of a male.

take the same case of a son, a daughter, and an equivocal hermaphrodite, it will readily be found that the "two shares" are $\frac{2}{5}$ and $\frac{1}{4}$, so that the moiety will be $\frac{13}{40}$; in the case of one male and no female, the "two shares" will be $\frac{1}{2}$ and $\frac{1}{3}$, and the moiety $\frac{5}{12}$; in that of one female and no male, the "two shares" will be $\frac{2}{3}$ and $\frac{1}{3}$, and the moiety will be $\frac{1}{2}$; and, in the case of the hermaphrodite standing alone, the "two shares" and the moiety will be the same as according to Abu Yusuf.

It may not be unimportant to observe that, by the operation of the rule of Abu Hanifa, an equivocal hermaphrodite may be either a sharer or a residuary according to circumstances; while, by that of the rules of Abu Yusuf and Muhammed, it would seem that it must always be a sharer, although its share is not, as in the case of other sharers, specifically defined.*

It is probable that, if a case of absolutely doubtful sex should ever arise, the doctrine of Abu Hanifa would be followed; for, although both Abu Yusuf and Muhammed nominally espouse one doctrine which is adverse to it, their constructions of that one doctrine are so different that they cannot fairly be said to maintain one and the same view in opposition to their great master. Under these circumstances it would probably be considered that Abu Hanifa's authority ought to prevail; but as the Court might possibly decide otherwise, we have thought it best to explain the principles of Abu Yusuf and Muhammed on this rather complex subject.

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* *Vide supra*, 11, 12.

It may be conjectured that if the propositus should die while the hermaphrodite is an infant, the difference between its share as an equivocal hermaphrodite and its larger share as a male or female (as the case may be) should be reserved, and dealt with afterwards as circumstances may require. This would seem a just inference from the doctrine mentioned above, that a hermaphrodite which is equivocal during infancy may be accounted a male or a female when it arrives at maturity.* There is no example of such a case, as far as we are aware, in the works to which we have access; but there would be no great difficulty in applying to such circumstances the processes indicated above in treating of the somewhat analogous case of the portions of posthumous children.†

Examples will be found in a later chapter showing more fully the application of the several doctrines above described.‡

Lost or Missing Persons (*in hâc* Believing Captives.)—A lost or missing person, in other words a person absent and unheard of, or, as elsewhere defined, "a person who disappears, and of whom it is not known whether he be living or dead, or where he resides,"§ is considered to be living as regards his own property, but dead as regards property of another.‖ The consequence

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* *Supra*, 153.

† *Vide supra*, 151, 152.

‡ Chap. XIV., Ex. 3, 4.

§ Hed. xiii. 1.

‖ Sir. 48, 49; 54. Shar. 101, 102.

is, that if the period after which death is presumed by law shall elapse without his being heard of, his own property will go to his inheritors in the usual manner, but any property which he would, if not lost or missing, have inherited from a person who has died after the time at which he was first missed, will go, not to them, but (having been reserved in the meantime) to the inheritors of that person.*

The period after which death will be presumed has been variously stated, but it is fixed by some of "the learned" at ninety years from the day on which the lost or missing person was born; and the author of the Sir. states that decisions are made in accordance with this view. The author of the Hedaya appears to be of the same opinion. He mentions, indeed, an opinion that the decision should be made according to the demise of the missing person's co-evals, but appears to consider this an unsatisfactory test, on account of the difficulty of ascertaining the necessary facts.†

It follows from the above that if, when a man dies, one of his heirs is a lost or missing person, the portions of the other heirs may be paid at once, but the portion of that person must be reserved until his return, or

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* Sir. *ibid.*; Shar. 101; Hed. xiii. 14, 15. The same principle holds as to a bequest to a lost or missing person. Hed. xiii. 14.

† Sir. *ibid.* and *vide* Hed. xiii. 10, 11, 16. At Shar. 101 it is suggested that the period is seventy years, but this, apparently, is only the unsupported opinion of Sir William Jones, as that period does not seem to be mentioned anywhere else.

until the proper period has elapsed. This in itself is simple enough; but the questions which arise are sometimes rather complicated, for it may happen that the portions of some of the heirs who are not lost or missing will be different according to different suppositions. For instance, if there be two sisters, a lost or missing brother, and a pat. uncle, the sisters will be entitled to $\frac{2}{3}$ as sharers if the brother is never found, but only to $\frac{1}{2}$, as residuaries with him, if he is found to be alive; while the pat. uncle, in the former case, will take the residue, $\frac{1}{3}$, but, in the latter, will be excluded. It is necessary, therefore, to give provisionally to each heir only the smallest portion (it may be nothing at all) to which he can be entitled, so as to retain a reserved portion which will be sufficient to meet the largest claim that can possibly arise.* When the time arrives for distribution of the reserved portion, the division will be made in such manner as may be rendered necessary by the events that have occurred in the meantime.

It must be remembered that the lost or missing person is deemed to die, not at the date at which he has become such, but at the precise time at which the declaration of his death is made; consequently his relations dying before that time cannot inherit from him.†

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* It will be remembered that we have to adopt a similar course in the case of posthumous children, *vide supra*, 152.

† Hed. xiii. 13.

It is only necessary to add that the rule as to a captive, if it is not known whether he is alive or dead, and if he is not known to have become an apostate, is identical with that relating to other lost or missing persons.*

Examples are given below showing how the above rules are applied.†

PERSONS DYING TOGETHER.—The rule as to persons who die by a common calamity, so that it is not known which of them died first, is,—according to the opinion of Abu Hanifa and his followers, which the author of the Sir. considers to be the "approved opinion,"—that they are to be considered to have died at the same moment, so that the property of each goes to his living heirs, and none of them can inherit from others. The author of the Sir., however, records the opinion of Ali and Ibnu Masuud that some of them will inherit from others, "except in what each of them has inherited from the companions of his fate."‡

The "approved" doctrine, of course, requires no explanation or inquiry; but the other at once causes the question to arise, how are we to determine who among the dead persons are to be deemed to inherit, and who are those from whom they will inherit? The Sir. offers no answer to this obvious inquiry, but it would appear from an example in the Shar. that if two persons, both

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* Sir. 51; 56. As to apostates, *vide* also *infra*, 184, &c.

† *Vide infra*, Chap. XIV., Ex. 5, 6.

‡ Sir. 51; 57; Shar. 103, 104.

possessed of property, die together, each of them, in turn, is deemed to survive the other, and they are held to inherit mutually *inter se.**

The words "except what each has inherited from the companions of his fate" are clearly not meant, as might be supposed, to prevent property which has been inherited by one deceased person from another from afterwards devolving upon a third; for it will be seen by an example in the Shar. that if a man die together with his brother's son and brother's son's son, and the last-mentioned person leave a daughter and wife, the wife will be entitled to a share, whereas, if the property were not supposed to pass from the brother's son to the brother's son's son, the whole must go to the brother's son's son's daughter as the only living heir of the brother's son.† The object of these words is therefore, probably, merely to negative the possible supposition that the property inherited by A. from B. can be inherited back by B. from A., a supposition which would cause a good deal of confusion if once countenanced.

Examples illustrating the principles above explained will be found in a later chapter.‡

INHERITANCE BY OTHER TITLES THAN RELATIONSHIP OR MARRIAGE.—The Sir. contains the following passage, enumerating the "successors" of a deceased person,

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* *Vide* Shar. 103, 104, and *infra*, Chap. XIV., Ex. 8.

† *Vide infra*, Chap. XIV., Ex. 7.

‡ *Vide infra*, Chap. XIV., Ex. 7, 8.

among whom, it will be remembered, his property is to be distributed after the satisfaction of funeral expenses, debts, and legacies*:—

"They" (the successors) "begin with persons entitled to shares, who are such as have each a specifick share allotted to them in the book of Almighty God; then they proceed to the residuary heirs by relation, and they are all such as take what remains of the inheritance, after those who are entitled to shares; and, if there be only residuaries, they take the whole property: next to residuaries for special cause, as the master of an enfranchised slave and his *male* residuary heirs; then they return to those entitled to shares according to their respective rights of consanguinity; then to the more distant kindred; then to the successor by contract; then to him who was acknowledged as a kinsman through another, so as not to prove his consanguinity, provided the deceased persisted in that acknowledgment even till he died; then to the person, to whom the whole property was left by will; and lastly to the publick treasury."†

From this it will be seen that there are four kinds of inheritors by other titles than relationship or marriage, viz. (1) a residuary for special cause, after residuaries by relationship, but in preference to the return; (2) a successor by contract, after distant kindred; (3) a person acknowledged as a kinsman through another, after a

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* *Vide supra*, 1, 2, note.

† Sir. 2; 2.

successor by contract; (4) the public treasury, after the person so acknowledged and all other descriptions of inheritors. And it may be well also to observe the doctrine also comprised in the above quotation from the Sir., that, although, as mentioned above, only one-third of the property can generally be left by will, yet, in the absence of all claimants prior to the public treasury, a will of the whole will take effect.*

We proceed to deal with the four kinds of inheritors above mentioned in the numerical order which we have assigned to them.

(1.) A residuary for special cause is a person, either male or female, who inherits from a freedman, by reason of the manumission of the latter; and such a residuary is either the actual manumittor, or, if the manumittor himself be dead, the residuary heir in his own right of the manumittor. This peculiar species of inheritance is sometimes called "willa of manumission," and the manumittor or such residuary heir is called a "mawla by manumission."† As a female cannot be a residuary in her own right, she can never inherit by virtue of her relationship to a manumittor, though she may inherit as being herself the manumittor. Thus, if a male manumittor die before his freedman, leaving a son and a

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* *Vide supra*, 1. See further on the subject of wills, *infra*, Chap. XV.

† Hed. xxxiii. 2, 9, 12, 14, &c.; Sir. 11; 14. "Willa of manumission," as distinguished from "willa of mutual amity," or succession by contract, as to which *vide infra*, 173.

daughter, the son alone will be a residuary for special cause, notwithstanding that the daughter is, in such a case, a residuary as regards her own father's property.* If, however, the daughter had herself been the manumittor, she would have been residuary for special cause.† Thus, when the daughter of one Hamaza, in the time of the Prophet, manumitted a slave, and that slave died leaving a daughter, the slave's daughter took ½ as a sharer, and the daughter of Hamaza took the rest as residuary for special cause.‡

But the above disability applies only to female residuaryship "by relation," for it is laid down that a female may succeed as residuary for special cause to a person who is himself entitled as such residuary; in other words, she may succeed, not only to the property of her own freedman, but to that of her freedman's freedman. And she may succeed, without a direct act of manumission, when she or her vendee has sold a manumission to a slave, or when she or her promisee has promised manumission after the death of herself or of the promisee

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* Hed. xxxiii. 12, 14; Sir. 11; 14; and *vide* illustration, Shar. 76, 77.

† *Ibid.*

‡ Hed. xxxiii. 3, 12. In the earlier of the paragraphs referred to Hamaza herself is said to have been the manumittor, obviously in error; in par. 12. the case is given as in our text, and at the end of that paragraph it is very clearly stated that the estate goes "to the sons of the emancipator, not to his daughters"; sons being, as will be remembered, residuaries in their own right, while daughters are sharers, or residuaries in right of their brothers.

respectively, or when her freedman or freedman's freedman "draws a relation" to her.*

The first of these conditions requires no explanation. It is illustrated by supposing that a woman manumits her slave, who afterwards purchases another slave and manumits him. The last-mentioned slave survives his manumittor, and, on his death, the woman may be his residuary for special cause, for he was the freedman of her freedman.†

The rules as to a woman selling or promising a manumission call for little more remark than this, that they appear to be precisely the same as those respecting a male, who, as seen hereafter, is residuary for special cause to his mokatib, to his modabbir, and to a slave manumitted by him for compensation.‡

The rule as to a promisee, however, &c. gives rise to a curious illustration in the Shar. A woman having apostatized, her slave is pronounced free by judicial decision; she afterwards returns to the faith, but that does not restore her right as his mistress, nor is she considered to be his manumittor. If, however, before her apostacy, she promised him his freedom at her death, she may, on his death before her, succeed as residuary for special cause. And, if he has bought a slave after the decision of the judge, and has promised that slave his freedom at

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* Sir. 11, 12; 14.

† Shar. 77.

‡ *Vide infra*, 170, 171, notes, and *vide* also Hed. xxxiii. 13.

his own death, and then died before him, she may succeed, in like manner, to the last-mentioned slave.*

The doctrine of drawing a relation is rather more complicated. If a woman's male slave marry a freedwoman with the consent of his mistress, and a son be born, that son is free, but is said to "bear a relation" to his mother's manumittor; but if the woman (*i.e.* the mistress) afterwards manumit the father, he is said to draw the relation to her, through himself, from the mother's manumittor, and she may succeed as residuary for special cause to the son on his dying after his parents, subject, of course, to the rights of his own heirs by relationship, if any. And if the said father, after his manumission, has bought a slave and married him to the freedwoman of another person, and a son has been born, and he has afterwards manumitted the slave, the woman (*i.e.* the manumittor of the said father) may succeed in like manner to the last-mentioned son.†

The above reasoning seems to assume as undisputed doctrine that, if there had been nobody to draw the relation, the manumittor of the mother would have succeeded; whence we may perhaps conclude, generally, that the manumittor of a freedwoman is a residuary for special cause, equally with that of a freedman, and that

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* Shar. 77. This illustration depends on the principle that a believer cannot be the slave of an infidel, *vide ibid.*

† Shar. 77, 78. This depends on the doctrine that, as regards the question of slavery or freedom, a child follows the condition of its mother, Shar. 78.

the manumittor of either is residuary for special cause to the child of the freedman or freedwoman, subject, of course, to the rights of his own relations (if any) as sharers or residuaries.

When a man or woman becomes proprietor of a slave who is related to him or her within the prohibited degrees of matrimony,* he (or she) manumits such person; or, as it has been otherwise expressed, when the purchase of such a slave is made, the slave becomes *ipso facto* free. The proprietor in a case of this kind may succeed as residuary for special cause to the person purchased and set free; and, if there are several purchasers who become entitled, they will divide what comes to them in the ratio of the sums which they have respectively contributed.†

The following doubt has been raised as to the rights of a manumittor's heirs. According to Abu Yusuf, if a freedman survive his manumittor but predecease the father and son of the latter, the father (in the absence, it will of course be understood, of preferable claimants by relationship) will take $\frac{1}{6}$ of the freedman's property, and the son the rest. This doctrine is, however, quite inconsistent with principle, for a residuary for special cause is the manumittor or his male residuary heir‡; and the father, in the presence of a son, is not a residuary,

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* As to what are the prohibited degrees, *vide* Shar. 79; Hed. ii. i, "Section"; and *vide infra*, Chap. XVI.

† Sir. 12; 15; Shar. 79; Hed. xxxiii. 7.

‡ *Vide supra*, 164.

but only a sharer. The view of Abu Yusuf is condemned by Abu Hanifa and Muhammed, who both maintain that the son alone succeeds; and there can be little doubt that the latter opinion would prevail if the question should ever arise in practice. With respect to the tr. grandfather there is no dispute, Abu Yusuf himself not giving him any portion.* A tr. grandfather, however, according to Abu Hanifa, takes precedence of a brother, of the manumittor.† And a female manumittor's son, of course, takes precedence of her brother; but, by a curious anomaly, the latter would have to pay a fine incurred by the freedman, because of his being a paternal relation.‡

The right of the residuary for special cause is considered to be a kind of compensation for a burden undertaken and a loss sustained by him; for he is liable to pay any deyit or fine incurred by the freedman,§ and he sustains, of course, a loss of property by the mere act of manu-

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* Sir. 12; 15; Shar. 67; Hed. xxxiii. 14. This is apparently one of the "four cases" in which the tr. grandfather's rights are said to be different from those of the father; *vide* Sir. 4; 6; Shar. 67, &c.; and *supra*, 27, 28.

† Hed. xxxiii. 14. It will be remembered that, according to Abu Hanifa, a tr. grandfather excludes an actual brother from inheritance, *vide supra*, 29, note; 130, note.

‡ *Ibid.*

§ Hed. xxxiii. 3. The words are, in this paragraph, "liability to the deyit, or fine of blood"; but *deyit* means a fine exacted for any offence on the person (*vide* Hed. l.). Moreover, in the marginal note the words "liable to fines" are used without limitation, and in xxxiii. 9, fines for "any offence" are alluded to.

mission itself. It is also considered that the manumittor has a right to inherit as having "given life" to the deceased by removing his bondage; and it was said by the Prophet that "the relationship of willa is like the relationship of consanguinity"; but this, as an argument for willa, loses much of its force by the absence of reciprocity, the freedman having no right to inherit from his manumittor.*

If a man, on manumitting his slave, make an engagement not to claim the right of willa, such an engagement is void as being contrary to the text of the Koran; and if a slave purchase his own freedom by a contract of kitabat, the right of willa accrues just as if he had been gratuitously manumitted, and that even if, by the terms of the contract, he only becomes free after the master's death. Further, there is no difference, as regards the right of willa, between manumission for a compensation and manumission without a compensation, for the tradition respecting willa is absolute.†

When a master of slaves dies, and his modabhirs and am-walids consequently become free, the right of willa accrues, for it is considered that he emancipated them by making them modabhirs and am-walids. The same

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* Hed. xxxiii. 3.

† Hed. xxxiii. 3–5. The "manumission for compensation" means immediate manumission for a promised sum (Hed. v. v. 1), and differs, therefore, from kitabat, which means a contract by a slave with his master for purchasing his freedom with a sum to be paid out of his earnings (Hed. xxxii.). A slave who has made a contract of kitabat is called a mokatib. *Ibid.*

principle holds good with respect to a slave to whom his master has bequeathed his manumission, or whom a testator has directed, by his will, to be purchased and set free ; the willa belonging, in the former case, to the master, in the latter, to the testator's estate.*

If a female slave become pregnant by a slave, and her master manumit her during the pregnancy, the child is born free, but the willa of the child belongs to the manumittor of the mother, for that person is considered to have manumitted the child also while yet unborn. This holds good when the female is delivered at any time short of six months from the date of her manumission ; for in such case the existence of the fœtus at the time of the manumission is certified.† And the same holds good if two children are born of her, one before and the other after the expiration of the six months; for in such case they are twins, and both must have come "from one seed," and, as one fœtus was in

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* Hed. xxxiii. 5, 6. A modabhir is a slave to whom his master has given his freedom expectant on his own decease, Hed. v. vi. 2 ; an am-walid is a female slave who has borne a child to her master, which child has been acknowledged and claimed by him; such a slave becomes free at her master's death, Hed. v. vii. 1, 3. And it may be added that if the owner of a female slave say to her, "If there be a child in your womb it is mine," nothing further is required to constitute her his am-walid, except the testimony of the midwife that she has subsequently been delivered of a child, Hed. iv. xiii. 13. Mr. Wilson, in his definition of am-walid (Wils. Gloss.), erroneously puts "son" for child.

† Hed. xxxiii. 8. Six months being, it may be remembered, the shortest period of pregnancy by Moohummudan law, *vide supra*, 150.

existence at the time of the manumission, the other must have been in existence also.* If, on the other hand, a child (otherwise than as last mentioned) be born more than six months after the date of the mother's manumission, it is not certain that the fœtus was in existence at the date of the manumission. The consequence is, that although the child is still born free, it is considered to be free merely as the dependant of the mother, and not by an independent manumission, on the supposition of the non-existence of the fœtus at that date. While, therefore, its willa will belong, primarily, to the mother's manumittor, it is held that if the father be manumitted afterwards the willa will shift to his manumittor.†

Some apparent exceptions occur to the last rule above mentioned. We say "apparent," because in each instance there is an appreciable distinction between the case proposed and the simple case stated above. If a female slave be the wife of a mokatib,‡ and he die leaving sufficient effects to discharge his ransom, and she, having been manumitted during her edit from his death, afterwards bear a child within two years from his death,§ the willa of the child belongs to the mother's

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* *Ibid.* Of course this must be considered to have reference only to cases where there are two children at one birth, one before, and the other after, the precise moment of the expiration of the six months.

† Hed. xxxiii. 9.

‡ *i.e.* a slave who has entered into a contract of kitabat, as to which, *vide supra*, 170, note.

§ The longest period of gestation is two years, *vide supra*, 150.

manumittor, even though it be born more than six months after the mother's manumission, because the fœtus must have been in existence before the death of the father, and *à fortiori*, at the time of her manumission. And if a female slave be manumitted during her edit from divorce, and bear a child within a less period than two years from the date of her manumission, the willa of the child belongs to the mother's manumittor, and not to the father's, whether the divorce were reversible or irreversible, for, in either case, it must be presumed that the fœtus was in existence before the divorce, and therefore, *à fortiori*, at the time of the manumission.*

The willa of manumission cannot be sold, or given away, or "inherited"; but, by the word "inherited" is here indicated the inheritance of the property by a sharer, not that by a residuary, who, as we have seen, succeeds to willa in case of the death of the actual manumittor.†

Examples illustrative of the doctrines relating to residuaries for special cause will be found in a later chapter.‡

(2.) A successor by contract, who succeeds, it will be remembered, in the absence of D. K. and claimants

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* Hed. xxxiii. 9. The presumption here mentioned depends on certain principles relating to the law of divorce, which it is not necessary to mention here.

† *Ibid.* (*dictum* from the Prophet), and *vide* also xxxiii. 12, 14, and *supra*, 163, 164.

‡ *Vide* Chap. XIV., Ex. 8, 9.

prior to D. K., is not defined in the Sir.; but from the Shar. we learn that he is a person to whom the deceased, being a man (or woman*) of unknown descent, has said, "Thou art my kinsman, and shalt be my successor after my death, paying for me any fine and ransom to which I may become liable," and who has assented to the condition. Two persons of unknown descent may become, in like manner, successors by contract reciprocally.†

The two persons entering into the species of contract above described are sometimes called mawlas; the contract, a contract of mawalat, or mutual amity; and the succession or right of succession conferred by it, willa of mutual amity.‡ The definition given in the Hedaya, which is somewhat different from that in the Shar., may be thus stated: "(For instance) a stranger says to a person whose proselyte he is, or to any other person, 'I enter into a contract of mawalat with you, so that if I die my property shall go to you; or if (on the other hand) I commit an offence, the fine is upon you or your akila,' and the person thus addressed assents,—in consequence of which he becomes the mawla of the stranger, and upon his decease without heirs inherits his property."§ The

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* *Vide infra*, 176, "unless there be a widow *or widower*."

† Shar. 58.

‡ Hed. xxxiii. 2; "of mutual amity," as distinguished from "willa of manumission," which is the succession of a residuary for special cause, *vide supra*, 164.

§ Hed. xxxiii. "Section". 1.

person who thus gives a right of inheritance is called mawla asfal, which has been rendered "client" or "inferior mawla"; the person who becomes liable to fines, mawla aaila, which has been translated "patron," or "superior mawla."* According to the Hedaya a mawla asfal must be a stranger, in other words, not an Arab.† The contract, according to the same authority, may be mutual (as also stated in the Shar.‡), and it may be of a partial character. Thus, if both parties make the stipulation as to inheritance, the survivor on either side will inherit; and if both stipulate to pay fines, each is responsible as to fines; but one stipulation does not imply the other, and no person is bound by a stipulation of either kind which he has not actually made.§

Either party to a contract of mawalat may, generally, dissolve the contract in the presence of the other, such a contract being a reversible act, like a bequest; and the client, or inferior mawla, may, generally, dissolve it in the absence of the patron, or superior mawla, by entering into a contract of mawalat with some other person, which dissolves it in effect; but the inferior has in no case power to dissolve it if the superior has already paid a fine for himself or for his child, because such payment operates as a consideration. And, in like manner, the child of the inferior cannot "turn from" the superior

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* Hed. xxxiii. "Section". 1, 2, 3.
† Hed. xxxiii. "Section". 1.
‡ *Vide supra*, 174.
§ Hed. xxxiii. "Section". 1.

if the latter has paid a fine either for his father or for himself.* It does not seem quite clear why the child should be considered to be bound by his father's contract, but the Hedaya states expressly that "with regard to the willa mawalat they are as one person."†

A freedman has no power to enter into a contract of mawalat, for he is already bound by willa of manumission, being deemed, in fact, to have a mawla already in his manumittor.‡

The Shar., while stating (in common with the Sir.) that the successor by contract succeeds in the absence of D. K., adds the words "unless there be a widow or widower, who is first entitled to a share,"§ There is no necessity, it would seem, for these words, for it is clear that, as the successor by contract comes after the D. K., he comes, *à fortiori*, after sharers. But, taking these words in connection with the words "of unknown descent," we are inclined to think the true doctrine to be, that although a successor by contract can take nothing if the deceased has left any known relations to inherit, he will take in the presence of a husband or wife, subject only to the claim of such husband or wife being satisfied.

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* Hed. xxxiii. "Section". 2–4.

† *Ibid.*

‡ Hed. xxxiii. "Section". 5. It is reasonable to presume, however, that he can enter into a contract of mawalat if his manumittor is dead, and has left no residuary or other person entitled to the willa of manumission.

§ Shar. 58.

(3.) A person "acknowledged as a kinsman through another, &c." who comes, as we have seen, after the successor by contract, is also called "the acknowledged kinsman by a common ancestor." Such a person is one of unknown pedigree, who has been acknowledged by the deceased as his brother or pat. uncle, or C. brother or C. pat. uncle,* though in fact he is not so related, provided that the deceased died without retracting the acknowledgment.†

The reason of this peculiar right is thus explained. As a person has full power over his estate when he has no relations to inherit, having, indeed, in such a case, a right to bequeath the whole as he likes, the acknowledgment thus made, in the absence of relations, operates on his own rights, and thus has the effect of making the acknowledgee possessor of the whole.‡

Such an acknowledgment, though somewhat similar to a legacy in its effect, is not in fact a legacy; and thus, if a man acknowledge one person in the manner above mentioned, and afterwards bequeath the whole of his property to another, the legatee will only take a third of the property; whereas, if the acknowledgment operated

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* That the C. relations are included in the definition may be gathered from the words, "that is related to him by his father or by his grandfather," Shar 59.

† Sir. 2; 3; Shar. 59.

‡ Hed. xxv. iii. "Section". 4. If the reader should refer to this passage, he must remember that the word "heirs," in the Hedaya, includes D. K. as well as Sh. and Res.

as a legacy, the acknowledgee and the legatee would divide the property equally.* It is of the nature of a legacy, however, so far as this, that the acknowledgee takes the property solely by virtue of the acknowledgment; and, consequently, if the acknowledger afterwards "deny his right of inheritance," or retract the acknowledgment and bequeath all the property to another, the latter will take the whole; or if there be no bequest, it will go to the public treasury.†

The acknowledgment of a person as a kinsman merely operates on the property of the deceased, and does not make the acknowledgee an actual kinsman; in the language of the Hedaya, it is not considered as establishing the parentage, for that would operate upon another than the acknowledger; and it is for this reason that, if any actual relations exist, the acknowledgee can take nothing, for they are kinsmen, and he is not. And it may be mentioned, in analogy with this, that, if a person die and his son acknowledge another to be his brother, the acknowledgee takes equally with the acknowledger, for that affects only the acknowledger himself; but the parentage is not established, for that would affect the rights of others.‡

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* Hed. xxv. iii. "Section". 4. And this is consistent with the rule of the Sir., which places the rights of the person "acknowledged as a kinsman" before those of the "person to whom the whole property was left by will," so that the latter can merely come in as an ordinary legatee.

† *Ibid.* As to the public treasury, *vide infra*, 179.

‡ Hed. xxv. iii. "Section". 3, 4; *infra*, 180.

The reader must not confuse the above subject with that of acknowledgments of debt by sick persons, though the two subjects are discussed in the same part of the Hedaya. There is nothing in the Hedaya, except the circumstance of this collocation, to suggest the idea that an acknowledgment of a person as a kinsman is invalid if made by a person in health, and there is certainly nothing in the Sir. to support such a belief.*

(4.) The public treasury comes, as seen above, after all other claims by inheritance, and it is important to remember also that although a man may, in the presence of any other inheritor, leave only a third of his property by will, yet a will of the whole will take precedence of the public treasury.† It does not appear very clearly what the public treasury is. Sir William Jones tells us, indeed, that there is always in it an ample fund arising from forfeitures and escheats, and that it is charged with the funeral expenses of those who leave no property, or none without a specific lien on it, and no relations who would, if they were living, be compellable by law to maintain them.‡ He tells us also that it is a fund for charitable uses, without, however, explaining (otherwise than as above mentioned) to

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* The words "dying person," in the marginal note of Hed. xxv. iii. "Section". 4, are evidently erroneous, as there is nothing of the kind in the paragraph itself.

† Sir. 2; 3; *supra*, 163, 164.

‡ Shar. 55.

what charitable uses it is devoted.* On the other hand, the Anglo-Indian judicature has, on one occasion at least, declared the public treasury to be an extinct institution.† It may, perhaps, be assumed for practical purposes that, in countries subject to British rule, there is, at the present day, no public treasury in the exact sense in which the expression is used in the Sir., but that the property of a deceased Mussulman will, in the absence of legatees or inheritors, or so far as their claims do not extend, escheat to the Crown equally with that of a deceased Englishman or Hindu.‡

ACKNOWLEDGMENT OF PERSON AS BROTHER BY SON.—It may be as well to mention in this place that if a man die, and his son acknowledge another person to be his own brother, that person will be entitled to share the inheritance with the son, though the parentage will not be established, as that might affect the rights of others. This rule must, no doubt, apply equally to all inheritors (*mutatis mutandis*), for it depends on the general principle that an acknowledgment by any person is effectual as regards that person's property, but ineffectual as regards all other people.§

ACKNOWLEDGMENT OF PERSON AS SON.—If a man

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* Shar. 60.

† Mussumat Soobhanee v. Bhetun, 1 S. D. A., 346.

‡ It can hardly be necessary to give any authority as to an Englishman; with respect to a Hindú, *vide* Rums. Hin. Ch. 29, note 4, &c.

§ Hed. xxv. iii. "Section", 5.

say of a boy, "This is my son," and afterwards die, and the mother of the boy then set up a claim as wife of the deceased, generally speaking she is to be considered as such, and the boy is to be considered his child, and they will both inherit from him. But if the other heirs maintain that she is an am walid, and she is not known to have been free (*i.e.* presumably, if she cannot bring satisfactory proof of her having been free), she will have no right to inherit.*

It may perhaps be thought, at first sight, that the last two subjects ought to have been ranged under the sub-title "Inheritance by other titles than Relationship or Marriage"; but it must be observed that the persons who take do not come within the range of "successors" as defined in the Sir.†; and, further, that a person acknowledged as a brother takes merely from the acknowledger by virtue of his acknowledgment, and is not really an inheritor at all; while a boy who is acknowledged as a son, and the mother of such boy, take on the supposition, raised by the statement of the deceased, that one is in fact the son, and the other the widow, of the deceased.

PERSONS WHO MAY NOT INHERIT (*in hâc*, Apostate Captives).—The circumstances which may prevent a person from inheriting are of five kinds:—(1) servitude, whether perfect or imperfect; (2) homicide; (3) diffe-

* Hed. iv. xiii. 13.

† *Vide supra*, 163.

rence of religion; (4) difference of country*; (5) imprecation.† We propose to deal with these in numerical order.

(1.) Servitude is of two kinds, perfect or absolute, and imperfect or privileged; the former being the condition of an ordinary slave, the latter that of a mokàtib, a modabhir, or an am walid.‡ Either condition is a bar to the acquisition of property, and consequently to inheritance.§

(2.) Homicide is of two sorts, punishable by retaliation, and expiable. Either sort is equally a bar to inheritance.‖

Homicide punishable by retaliation is, apparently, homicide with *malice prepense*, or murder; and it is deemed to be committed when a human being is unjustly killed with a weapon or with any dangerous instrument likely to occasion death, as a sharp stick or large stone, or with fire, as having the effect of the most dangerous instrument.¶ Here the definition seems to stop, and it has been doubted whether it is to be extended to poison or drowning; but, according to reason, it would seem

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* Sir. 2; 3.

† Hed. iv. x.

‡ Shar. 60; and for definition of mokatib, &c., *vide supra*, 170, 171, notes. The words "privileged slave" are also sometimes used as equivalent to "mazoon"; but the word "privileged" has not that sense here, for a mazoon is, in fact, an absolute slave.

§ Sir. 2; 3; Shar. 60.

‖ Sir. *ibid.*

¶ Shar. 61.

that it ought to be extended to these and to any other means of purposely destroying life, as suffocation, starving, or the like; for all these, equally with fire, may be said to have "the effect of the most dangerous instrument."

Expiable homicide is of two kinds, being either caused by an act directed against the party but without proof of malice, as when death ensues from a beating or blow with a slight wand, a thin whip, a small pebble, or anything not ordinarily dangerous; or purely accidental, that is, neither designed nor preventible by ordinary care: as if a man shoot at a wild beast and the arrow kill another man by accident; or if a man fall from his terrace and kill another by his fall.

In order that a man shall be disabled from inheriting by the purely accidental death of another, it is necessary that his act should be the actual, not merely a remote, cause of the death. To illustrate this it has been said that if a man dig a pit or fix a large stone in the field of another man, and the latter be killed by falling at night into the pit or running against the stone, the former will not be generally disabled from inheriting. From the use of the word "generally," however, it may perhaps be inferred that the question of his being disabled or not must depend on the circumstances of the case, as tending to show whether the pit was dug or the stone fixed in such a manner as to be likely to cause injury or not.*

* The above particulars as to the nature of the different kinds of homicide are obtained from Shar. 61, 62.

(3.) Generally, an infidel (a person not of the Moohummudan religion) cannot inherit from a believer (a person professing that religion), nor, on the other hand, can a believer inherit from an infidel; but infidel subjects of a Mussulman state (or, as elsewhere stated, infidels generally), can inherit from one another.* And it is immaterial, for such a purpose, whether they be of the same religion or not; all unbelievers being considered as of one class.† On the other hand, an apostate infidel has no claim to inherit from an infidel residing in the Mussulman territory.‡ In connection with this subject it may be mentioned that if a Christian or a Jew, being in sound health, build a church or a synagogue, and then die, the church or synagogue descends according to the law of inheritance like any other property.§

An apostate stands, in many respects, on a different footing from other infidels. Neither a male nor a female apostate can inherit from a believer; nor can either of them inherit from another apostate, except when the people of a whole district become apostates together, in which case they inherit among themselves. But all the

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* Shar. 62; Hed. ii. ii. 16.

† Hed. lii. vi. 11.

‡ Hed. lii. vi. 12.

§ Hed. lii. vi. 1. *Secus* if he direct by will that his house be converted after his death into a church, &c., for in such case the bequest takes effect in the usual way, viz. to the extent of a third of his property, *ibid.*

property of a female apostate goes to such of her heirs* as are believers; and, according to Abu Hanifa, the property of a male apostate acquired before his apostacy goes in like manner to his heirs, but that which he has acquired in his own country since his apostacy goes to the public treasury.† Abu Yusuf and Muhammed, however, consider that both these kinds of property of a male apostate go to his believing heirs. Such rights of inheritance to an apostate as are mentioned above will accrue on his passing into a hostile country (the Kadi having given judgment as to his passage thither) in like manner as if he were dead; but all property that he may acquire after his arrival in the hostile country is confiscated.‡ If a person who is a captive in a foreign country become an apostate, the rules respecting him are the same as those concerning any other apostate.§

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* We use the word "heirs" in treating of apostates, because that word is used in the Sir.; but it may reasonably be presumed that, in the absence of sharers and residuaries, the rights of other successors will come in their usual order.

† As to the public treasury (what it is, and whether it still exists), *vide supra*, 179.

‡ Sir. 50; 55, 56. The word "confiscated" is used in the Sir. without explanation; but we may fairly presume the meaning of this rule to be, that if anything comes to the absent apostate by inheritance, or the like, it will be forfeited to the State, instead of being treated as property of a lost or missing person (*vide supra*, 158, &c.

§ Sir. 50; 56. As to a captive who is not known to have apostatized, *vide supra*, 161.

We are told in the Shar. that, as the law is now settled, "the heirs of an apostate who were in being at the time of his death are entitled to their legal shares whether they were born before or after his apostacy"; but we are further told that "a husband or wife cannot succeed to an apostate, because a change of religion is an immediate dissolution of the marriage."*

In corroboration of the latter proposition, we read that, in the opinion of Abu Hanifa and Abu Yusuf, if either husband or wife apostatize, the marriage ceases to exist without a sentence of divorce.† A rather different result follows when husband and wife have both been infidels, either originally or by apostacy, and one of them becomes a believer, for in such case, it would seem, a decree of separation by the magistrate is necessary to effect a divorce; and, in the opinion of Abu Hanifa (contrary to that of Abu Yusuf and Muhammed) such a decree can only be made on the application of both parties.‡ If husband and wife apostatize together, or become converted together (either from original infidelity or after a joint apostacy), no separation ensues. Thus, when a whole tribe were deemed to have aposta-

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* Shar. 103. That is, no doubt, a believing wife cannot succeed to an apostate husband, nor a believing husband to an apostate wife. We give the actual words, which are probably those of Sir W. Jones, and, as often happens with his statements, are rather vague and loose.

† Hed. ii. v. 14.

‡ *Ibid.* 3.

tized together (by reason of the uncertainty of the dates), and afterwards returned to the faith together, their marriages were held to be still valid,* and consequently, no doubt, the wives could succeed to the husbands and the husbands to the wives.

(4.) The difference of country, which operates, as above-mentioned, as a bar to inheritance, is either actual or qualified, the former kind existing (*e.g.*) between an alien enemy and an alien tributary, the latter between a fugitive and a tributary, or between two fugitive enemies from two different states. States are said to differ from one another "by having different forces and sovereigns, there being no community of protection between them."†

In order to bring home to the reader more clearly the meaning of the above rules as to aliens, it may be as well to mention that a Mussulman state is called by Moohummudan lawyers the "seat of peace," and a state ruled by a sovereign of any other religion the "seat of hostility." By an "alien enemy" is meant an alien residing in the seat of hostility, by an "alien tributary," an alien who has chosen his domicile in the seat of peace, and pays the tribute exacted from infidels; and neither of such aliens can inherit from the other. A "fugitive," on the other hand, is an alien coming from the seat of hostility, seeking quarter and obtaining a temporary residence in the seat of peace; and there is no right of inheritance between such a person and a tributary, nor

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* Hed. ii. v. 1, 15. † Sir. 2, 3; 3, 4.

between two such persons if they come from different states.*

(5.) Imprecation is as follows; if a man accuse his wife of adultery, and deny the descent from him of a child about to be born of her, and verify his allegation by oath, the Kazee must issue a decree denying the descent of the child from the husband, and fixing it upon the mother, and the child thereby becomes bastardized.†

In the opinion of the author of the Sirájiyyah, a person incapable of inheriting‡ cannot exclude another, or lessen the share of another; but he thinks it worth while to record the opinion of Ibnu Masuud, to the effect that such a person can "exclude imperfectly," in other words, that he can lessen the share of another, although he cannot take anything himself.§

Examples, showing the effect of this difference, will be found in a later chapter. ‖

RIGHTS TAKING PRECEDENCE OF INHERITANCE.—It will be remembered that there are three successive duties

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* Shar. 62, 63.

† Hed. iv. x. 10, 15. The reader is referred to this chapter of the Hedaya for further details on the subject of imprecation (*laan.*).

‡ This observation has reference only to the first four species of disabilities enumerated in our text. Imprecation is not mentioned in the Sirájiyyah among the "impediments to succession," and a child who thus loses his *status* is probably considered as an absolute stranger, so that no question can arise as to his excluding others.

§ Sir. 13; 16.

‖ *Vide infra*, Chap. XIV., Ex. 10, 11.

which "belong to the property of a deceased person," and are "to be performed by the magistrate," prior to the "distribution of the residue among his successors"; viz. (1) the funeral ceremony and burial of the deceased, without superfluity of expense, yet without deficiency; (2) the discharge of his just debts from the whole of his remaining effects; (3) the payment of his legacies out of a third of what remains after his debts are paid.* Every legal duty must involve a corresponding legal right to have that duty performed. We propose, therefore, to deal with these duties under the title of "Rights taking Precedence of Inheritance."

The subject numbered (3), involving as it does the whole subject of Moohummudan wills, is so wide that we have proposed to treat it in a separate chapter, which will be found later in the work.† With respect to (1) and (2), the following observations may be useful.

(1.) Although funeral expenses come, generally, before debts, it is said that, in the opinion of Sharif, a house on which there is a lien is not to be sold even to defray funeral expenses,‡ and it is clearly implied in the Shar. that the funeral expenses are not be paid out of any property on which there is a "special lien." § And it is implied in another passage, that funeral expenses are

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* *Vide supra*, 1, 2, note.

† *Vide infra*, Chap. XV.

‡ Sir., Preface, ix.

§ Shar. 55. The words "special lien," however, are left undefined.

not to be paid out of any property on which any "legal claim, by hypothecation or otherwise," has previously attached.*

The words "without superfluity of expense, yet without deficiency," are not left without interpretation; for it is laid down that more than three pieces of cloth for a man, or more than five for a woman, are superfluous, and less are insufficient; that the burial garments must be neither more nor less costly than the dress that the deceased usually wore when alive; and that if he had, when living, one sort of apparel for solemn festivals, a less costly one for visiting friends, and a still less expensive one for home wear, the intermediate one must regulate the cost of that in which he is to be buried.

There is an exception to the above rules in the case of the debts being so large as to cover the whole property, for in such case the expense must be only "sufficient," which is explained to mean that only two pieces of cloth are to be used for a man or three for a woman.†

If a deceased person leave no property, or none without a special lien on it, the funeral expenses must be paid by such of the relations as would have been com-

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* Shar. 54.

† Shar. 54, 55. In the same place we are informed that the names, dimensions, and uses, of all the cloths used in funerals, both for men and for women, are enumerated in Persian by Muhammed Kasim, who translated the Sir. and Shar. into that language by order of Mr. Hastings, adding numerous comments of his own; *vide* Sir., Preface, iv.

pellable by law to maintain him if living; and, if there be no such relations, by the public treasury.* It is beyond the scope of this work to enter fully into the subject of maintenance, but it may be mentioned that, generally, every person, whether infant or adult, must be maintained out of his own property, if any.† Subject to this primary rule, a man must, generally, maintain his wife, infant children, father, mother, grandfathers, grandmothers, infant male relatives (and even adult, if poor and also disabled or blind) within the prohibited degrees, and female relations, whether infant or adult, within those degrees.‡

(2.) As debts take precedence of claims of inheritance, the inheritors can, of course, take nothing if the debts exceed or equal the estate in amount.§ Debts are of two kinds, "debts of health," and "debts of sickness." The former are debts in the ordinary sense of the word, or debts by acknowledgment while in health; the latter, debts of which the cause is unknown, and which are not really proved to be owing; debts existing, in fact, merely by the acknowledgment of a dying person, which is some-

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* Shar. 55. As to the public treasury, *vide supra*, 179. The words "special lien" are not defined.

† Hed. iv. xv. "Section" 4. 9.

‡ Hed. iv. xv. "Section" 1. 1; "Section" 4. 1; "Section" 5. 1, 2, 6. In the same chapter of the Hedaya the reader will find the subject of maintenance treated in full detail.

§ This follows, of course, from the order given, as above mentioned, in the Sir.; and it is clear also from passages in the Hedaya, *vide* Hed. xxvi. iii. "Section" (second). 12; and as to debts of sickness, Hed. xxv, iii. 4.

what analogous to a gift by a dying person, but differs from it in some important points. Debts of health, whether for a known cause, as the purchase of a house, or the like, or merely by acknowledgment during health, take precedence of debts of sickness.* A religious vow, or promise of a charitable donation as an atonement for sin, is not either a debt of sickness, or a debt of health, but a "debt of conscience" only. It has therefore no effect on a man's property after his death, unless made by bequest; and, if so made, it is restricted, like other bequests, to a third of the property remaining after payment of debts.†

Dower, it will be remembered, is a debt,‡ and is therefore payable, if it be a debt of health, as it generally is, in preference to a debt of sickness.

If the property of a deceased person is not sufficient to pay the debts due to actual creditors, it is divided among them in proportion to their claims.§ In such a case, a person claiming merely in respect of a debt of sickness can of course get nothing; and, *à fortiori*, the inheritors can get nothing.

If, on the other hand, the property is sufficient to pay the debts of health, with something over, the Kazee, it would seem, must pay the creditors in full, and pay what

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* Shar. 56; Hed. xxv. iii. 1; lii. ii. "Section". 1.

† Shar. 56.

‡ *Vide supra*, 145, note.

§ Sir. 21; 26; Shar. 88; Hed. lii. ii. 2.

remains to the inheritors (assuming, of course, that there are no prior claims); and he is not, according to Abu Hanifa, at liberty to require security for the mere chance of some other creditor or heir being in existence, when no such person is known to exist. Abu Yusuf and Muhammed, however, consider that he is bound to require security; but it is not easy to see how their doctrine can be carried out, as, the possible claim being uncertain in time and amount, it would be necessary to retain security to the amount of the whole property for ever.*

It is not necessary to make any further observations as to debts of sickness in this place, the subject of acknowledgments by sick persons being treated more at length in a later part of this work, in connection with other subjects with which it has a certain amount of analogy, while at the same time there exist between them various distinctions which it is of great importance to point out.†

ACKNOWLEDGMENT OF DEBT BY INHERITOR.—In connection with the subject of debts, it may be as well to mention that, if one of several inheritors acknowledge a debt to be due by the deceased, and other inheritors deny it, the debt is charged (presumably in the absence of satisfactory evidence as to its existence or non-existence) on the portion of the acknowledger.‡

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* Hed. xx. iv. 4.

† *Vide infra*, Chap. XV., Sub-title, "Dispositions by Sick (Dying) Persons."

‡ Hed. xxv. iii. "Section". 6.

COMPOSITION OF INHERITANCE.—*Takharij*, or composition of inheritance, is an arrangement entered into by one or more of the inheritors with the rest, by which the former agrees or agree to accept some specified thing as a consideration excluding him or them from inheritance.* It may be convenient to designate such inheritor or inheritors, generally, as the compounding inheritor. The right thus to compound is limited by certain rules which are thus laid down.

If the estate of the deceased be completely overwhelmed with debt, there can be no composition, for there is nothing to divide among the inheritors.†

If the estate of the deceased consist partly of a debt due to him, such debt cannot be directly included in a composition, because this would involve the compounding inheritor's purporting to give up his portion of the debt to the other, and the property of a debt cannot be conveyed to any but the person indebted, whence the whole composition would be void, for a contract which is invalid with respect to a part of its subject is invalid with respect to the whole.‡

The same object may, however, be accomplished indirectly in three different ways. First, there may be a condition that the compounding inheritor may release the debtor from his portion of the debt, and that the

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* Hed. xxvi. iii. "Section" (second). 1.

† Hed. xxvi. iii. "Section" (second). 12.

‡ Hed. xxvi. iii. "Section" (second). 6. A contract of marriage forms an exception to the last-mentioned rule, *vide infra*, Chap. XVI.

other inheritors shall not exact it; secondly, the other inheritors may pay to the compounding inheritor, "in a gratuitous manner," his portion of the debt, and then make a composition with him for his portion of the collected part of the estate; thirdly, (and this is considered the safest, and therefore the best, mode), the other inheritors may lend to the compounding inheritor the amount of his portion of the debt, and then compound with him for his portion of the collected estate, and he may then transfer the sum so lent to him to the debtor, who will then pay it, with the rest of the debt, to the other inheritors.*

With the exception of debts, however, the property of the deceased, whether consisting of land or of goods and effects, may form the subject of a composition, and the property given to the compounding creditor may be either less or more than the actual value of his portion, for the transaction may be considered to be of the nature of a sale, and in the case of a sale, generally, equality is not necessary.† Thus, if the estate consist of silver, and gold is given to the compounding inheritor (or *vice*

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* Hed. xxvi. iii. "Section" (second). 7–9. It may seem strange that the law should expressly permit that to be done indirectly which may not be done directly; but similar anomalies are found in our own law. Thus, there may not be a remainder after an estate in fee simple, but an executory use may often effect the same object. Thus, also, certain kinds of property cannot be given to a spinster on a condition that she shall not marry; but they may be given to her until marriage, and then over to somebody else.

† Hed. xxvi. iii. "Section" (second). 2.

versâ), the values, in accordance with the above rule, need not be the same. In such a case as this, mutual interchange of seisin is primarily necessary; but here a curious distinction arises. If the inheritors who take the remainder of the estate admit the seisin, a new seisin is necessary, for such admitted seisin is of the nature of a trust; but if they deny it, the original seisin is sufficient, for it is then of the nature of an usurpation, not of a trust.*

If, on the other hand, the estate consist of gold, silver, and other goods and effects, and the compounding inheritor take gold and silver in lieu of his whole portion, the sum given must necessarily be of more value than the portion of the gold and silver that he would take by inheritance, for it is to include also the consideration for his portion of the other property. In this case, there must be seisin of that which he is to have in exchange for his portion of the gold and silver; but seisin of that which he is to have over and above is not necessary. But if he take goods and effects in exchange, the questions of seisin and value are immaterial.

Generally, if a composition be made simply for goods and effects, *i.e.* property not consisting, even in part,

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* Hed. xxvi. iii. "Section" (second). 3. The species of trust here mentioned will be described in the chapter on Wills, where it will be shown that, although executors may be appointed, their duties are, apparently, of a limited nature, so that certain responsibilities in the nature of trusts devolve upon the inheritors, *infra*, Chap. XV.

of gold or silver, seisin is not necessary, and the article given may be of greater or of less value than the portion compounded for*; but if, on the other hand, the estate consist of coin, and the composition be in coin, the amount may still be of greater or less value than the portion compounded for, but seisin in this case is necessary.†

In cases where it is entirely unknown what kinds of property the estate comprises, a doubt has been raised whether articles of weight, or of measurement of capacity, may form the consideration for a composition, and the authors of the Hedaya do not give their own opinion on the subject. But when, although it is not actually known of what the estate consists, it is known that it does not consist of such articles as above mentioned, the "most approved opinion" is that such a composition is lawful, and it may therefore, perhaps, be assumed that such is the better opinion in the former case also.‡

When one of several inheritors accepts a composition for his portion, the sum or article taken by him will be reckoned, for the purpose of calculating the portions of the others, as being his actual share according to law. Thus, if a husband agree to retain his deceased wife's unpaid dower, and the other inheritors be a mother and a pat. uncle,

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* Hed. xxvi. iii. "Section" (second). 4.

† Hed. xxvi. iii. "Section" (second). 5. "Dirms and deenars"; but it may, we submit, be presumed that the principle will extend to all kinds of actual money.

‡ Hed. xxvi. iii. "Section" (second). 10, 11.

the dower will count as $\frac{1}{2}$, and the mother will take $\frac{2}{3}$ of what is left, while the pat. uncle will take the residue.*

DECREES OF THE KAZEE.—The Hedaya contains a short chapter intituled "Of the Decrees of the Kazee relative to Inheritance." Some of the rules contained in the chapter in question have been incorporated in this work, but others have been left unnoticed, as being either of slight importance or only indirectly connected with our subject. We only allude to this chapter here, in order that our readers may be aware of its existence, and may examine it for themselves if they think proper.†

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* Sir. 21; 26, and *supra*, 13.

† Hed. xx. iv.

CHAPTER XIV.

EXAMPLES ON SPECIAL RIGHTS AND DISABILITIES.

EXAMPLE 1 (Posthumous Children).—Wife (pregnant), mother.*

On the supposition that four sons will be born:—

Wife, $\frac{1}{8}$
Mother, $\frac{1}{6}$
Four posthumous sons (residue), $\frac{17}{24}$

On the supposition that four daughters will be born:—

Wife, $\frac{1}{8}$
Mother (primarily), $\frac{1}{6}$
Four posthumous daughters (primarily), $\frac{2}{3}$
Residue to go to mother and daughters by the return, $\frac{1}{24}$

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* Hed. xiii. 17.

On the supposition that no child is born:—

Wife, $\frac{1}{4}$
Mother (primarily), $\frac{1}{3}$
Residue, to go to mother by the return, $\frac{5}{12}$

Hence, remembering that the provisional portions of the claimants are the smallest portions to which they can be entitled, and that the reserved portion is what remains after allotting those provisional portions, we have, provisionally:—

Wife, $\frac{1}{8}$
Mother, $\frac{1}{6}$
Reserved portion, $\frac{17}{24}$

The following will be the distribution of the reserved portion under various circumstances.

First case.—If four sons be born, the mother's and wife's provisional shares require no alteration; the sons, who are residuaries, will take the residue; and as that is exactly identical with the reserved portion, the reserved portion will be thus fully appropriated.

Second case.—If four daughters be born, they will be entitled to $\frac{2}{3}$ as their share, and that amount must be given to them out of the reserved portion. The wife's share remains unaltered. There remains $\frac{17}{24} - \frac{2}{3}$, or $\frac{1}{24}$, which will go, by the return, between the mother and daughters in the ratio $\frac{1}{6} : \frac{2}{3}$, or 1 : 4. Hence the reserved portion will be thus distributed:—

Mother, $\frac{1}{5}$ of $\frac{1}{24}$, or $\frac{1}{120}$
Daughters, $\frac{2}{3} + \frac{4}{5}$ of $\frac{1}{24}$, or $\frac{7}{10}$

But $\frac{1}{120}+\frac{7}{10}=\frac{17}{24}$, so that the reserved portion is fully distributed.

Third case.—If no child be born, the wife's share is $\frac{1}{4}$, and the mother's, primarily, $\frac{1}{3}$; but the mother will also be entitled to the residue by the return; therefore, the wife must have from the reserved portion so much as will make up her share to $\frac{1}{4}$, and the mother will have all the rest.* Hence the reserved portion is thus distributed:—

Wife, $\frac{1}{4}-\frac{1}{8}$, or $\frac{1}{8}$
Mother, $\frac{17}{24}-\frac{1}{8}$, or $\frac{7}{12}$

But $\frac{1}{8}+\frac{7}{12}=\frac{17}{24}$; therefore, again, the reserved portion is fully distributed.

The results may thus be exhibited with the L. C. D.:

	Provisional portions.	From distribution of reserved portion. 1st case.	2nd case.	3rd case.
Wife . .	$\frac{15}{120}$	—	—	$\frac{15}{120}$
Mother . .	$\frac{20}{120}$	—	$\frac{1}{120}$	$\frac{70}{120}$
4 posthumous sons . .	—	$\frac{85}{120}$	—	—
4 posthumous daughters .	—	—	$\frac{84}{120}$	—

* The Hedaya, in its treatment of this example, makes no mention of the return, simply stating that the provisional shares are $\frac{1}{8}$ and $\frac{1}{6}$, and that if the fœtus be born alive these will be the actual portions, and if it be born dead the portions will be $\frac{1}{4}$ and $\frac{1}{3}$. This would, in fact, be so if there were residuaries in each case; but in our working of the example we have assumed, as usual, that the relations mentioned are the only relations in existence, and that, consequently, there are not any residuaries in the 2nd and 3rd cases.

EXAMPLE 2. — (Posthumous Children). — Father, mother, wife (pregnant), daughter.*

On the supposition that four sons are born:—

Father, $\frac{1}{6}$
Mother, $\frac{1}{6}$
Wife, $\frac{1}{8}$
Daughter, $\frac{1}{9}$ of residue, or $\frac{13}{216}$
4 posthumous sons, $\frac{8}{9}$ of residue, or $\frac{13}{27}$

On the supposition that four daughters are born, primarily:—

Father, $\frac{1}{6}$
Mother, $\frac{1}{6}$
Wife, $\frac{1}{8}$
Daughter and 4 posthumous daughters, $\frac{2}{3}$

But $\frac{1}{6}+\frac{1}{6}+\frac{1}{8}+\frac{2}{3}=\frac{4}{24}+\frac{4}{24}+\frac{3}{24}+\frac{16}{24}=\frac{27}{24}$

Hence, this is a case of increase, and the denominator must be increased to 27, so that we shall have:—

Father, $\frac{4}{27}$
Mother, $\frac{4}{27}$
Wife, $\frac{3}{27}$
Daughter, $\frac{1}{5}$ of $\frac{16}{27}$, or $\frac{16}{135}$
4 posthumous daughters, $\frac{4}{5}$ of $\frac{16}{27}$, or $\frac{64}{135}$

On the supposition that no child is born:—

Father, $\frac{1}{6}$+(residue) $\frac{1}{24}$, or $\frac{5}{24}$
Mother, $\frac{1}{6}$
Wife, $\frac{1}{8}$
Daughter, $\frac{1}{2}$

* Sir. 47; 52; Shar. 100.

Hence, remembering, as in the previous example, the rules for ascertaining the provisional portions, &c., we have, provisionally:—

Father, $\frac{4}{27}$
Mother, $\frac{4}{27}$
Wife, $\frac{3}{27}$
Daughter, $\frac{13}{216}$

Reserved portion, $1-(\frac{4}{27}+\frac{4}{27}+\frac{3}{27}+\frac{13}{216})$, or $\frac{115}{216}$

The following will be the distribution of the reserved portion under various circumstances:—

First case.—If there are four sons born, the father, mother, and wife must have their portions made up out of the reserved portion to $\frac{1}{6}$, $\frac{1}{6}$, $\frac{1}{8}$, respectively; the daughter's portion remains unaltered; the posthumous sons will have their entire portion out of the reserved portion. Hence the reserved portion will be distributed thus:—

Father, $\frac{1}{6}-\frac{4}{27}$, or $\frac{1}{54}$
Mother, $\frac{1}{6}-\frac{4}{27}$, or $\frac{1}{54}$
Wife, $\frac{1}{8}-\frac{3}{27}$, or $\frac{1}{72}$
4 posthumous sons, $\frac{13}{27}$

But $\frac{1}{54}+\frac{1}{54}+\frac{1}{72}+\frac{13}{27}=\frac{115}{216}$, so that the reserved portion has been fully distributed.

Second case.—If there are four daughters born, the provisional portions of the father, mother, and wife remain unaltered; the daughter must have her provisional portion made up out of the reserved portion to $\frac{16}{135}$, the four posthumous daughters will have their entire por-

tion out of the reserved portion. Hence the reserved portion will be thus distributed:—

Daughter, $\frac{16}{135}-\frac{13}{216}$, or $\frac{7}{120}$
4 posthumous daughters, $\frac{64}{135}$

But $\frac{7}{120}+\frac{64}{135}=\frac{115}{216}$; therefore, in this case also, the reserve portion is fully distributed.

Third case.—If no child is born, the father's provisional portion must be made up to $\frac{5}{24}$, the mother's and wife's respectively to $\frac{1}{6}$ and $\frac{1}{8}$, the daughter's to $\frac{1}{2}$; the following will therefore be the distribution of the reserved portion:—

Father, $\frac{5}{24}-\frac{4}{27}$, or $\frac{13}{216}$
Mother (as in the first case), $\frac{1}{54}$
Wife (as in the first case), $\frac{1}{72}$
Daughter, $\frac{1}{2}-\frac{13}{216}$, or $\frac{95}{216}$

But $\frac{13}{216}+\frac{1}{54}+\frac{1}{72}+\frac{95}{216}=\frac{115}{216}$; therefore here, again, the reserved portion is fully distributed.

The results obtained above may thus be exhibited with the L. C. D.:—

	Provisional portions.	From distribution of reserved portion. 1st case.	2nd case.	3rd case.
Father . .	$\frac{32}{216}$	$\frac{4}{216}$	—	$\frac{13}{216}$
Mother . .	$\frac{32}{216}$	$\frac{4}{216}$	—	$\frac{4}{216}$
Wife . .	$\frac{24}{216}$	$\frac{3}{216}$	—	$\frac{3}{216}$
Daughter .	$\frac{13}{216}$	—	$\frac{115}{216}$	$\frac{95}{216}$
4 posthumous daughters .	—	—		—
4 posthumous sons . .	—	$\frac{104}{216}$	—	—

It would be easy to multiply the cases almost indefinitely by supposing one son, two sons, one daughter, two daughters, one son and one daughter, &c., to be born; but it would be of no advantage to enter into these details; for the general rules as to the rights of sons and daughters will enable the reader to apply the principles above illustrated to any particular case that may arise in practice.

EXAMPLE 3.—(Hermaphrodites).—Son, equivocal hermaphrodite child.*

On the supposition that the hermaphrodite is a male:—

Son, $\frac{1}{2}$
Hermaphrodite, $\frac{1}{2}$

On the supposition that it is a female:—

Son, $\frac{2}{3}$
Hermaphrodite, $\frac{1}{3}$

According to Abu Hanifa, the distribution must be according to the supposition which is the less favourable to the hermaphrodite; hence it will be exactly in accordance with the second supposition.

According to Abu Yusuf, the hermaphrodite will take $\frac{3}{4}$ of what he would take if put in the place of the

* Hed. liii. "Section ii." 10.

son; but the son, who would then stand alone, would be entitled to the whole. Hence we have:—

Son, the whole, or 1
Hermaphrodite, $\frac{3}{4}$

But $1+\frac{3}{4}=\frac{4}{4}+\frac{3}{4}=\frac{7}{4}$

Hence, this is a case of increase, and the denominator must be increased to 7. We then have:—

Son, $\frac{4}{7}$
Hermaphrodite, $\frac{3}{7}$

According to Muhammed, the share of the hermaphrodite is half his portion on the first supposition, added to half his portion on the second. Hence we have:—

Hermaphrodite, $\frac{1}{2}$ of $(\frac{1}{2}+\frac{1}{3})=\frac{5}{12}$
Son (residue), $\frac{7}{12}$

EXAMPLE 4. — (Hermaphrodite). — Son, daughter, equivocal hemaphrodite child.*

On the supposition that the hermaphrodite is a male:—

Son, $\frac{2}{5}$
Daughter, $\frac{1}{5}$
Hermaphrodite, $\frac{2}{5}$

On the supposition that it is a female:—

Son, $\frac{1}{2}$
Daughter, $\frac{1}{4}$
Hermaphrodite, $\frac{1}{4}$

* Sir. 43, 44; 48, 49.

According to Abu Hanifa, the distribution, as in the previous example, will be exactly in accordance with the second supposition.

According to Abu Yusuf, as the hermaphrodite, if put in the place of the son, would take $\frac{2}{3}$, and, if put in the place of the daughter, would take $\frac{1}{3}$, the "two shares" are $\frac{2}{3}$ and $\frac{1}{3}$, and we have*:—

Son, $\frac{2}{3}$
Daughter, $\frac{1}{3}$
Hermaphrodite, $\frac{1}{2}$ of $(\frac{2}{3}+\frac{1}{3})$, or $\frac{1}{2}$

But $\frac{2}{3}+\frac{1}{3}+\frac{1}{2}=\frac{4}{6}+\frac{2}{6}+\frac{3}{6}=\frac{9}{6}$

Therefore this is a case of increase, and the denominator must be increased to 9. Hence we have:—

Son, $\frac{4}{9}$
Daughter, $\frac{2}{9}$
Hermaphrodite, $\frac{3}{9}$, or $\frac{1}{3}$

According to Muhammed, the hermaphrodite's portion, ascertained as in the previous example,* is—

$\frac{1}{2}$ of $(\frac{2}{5}+\frac{1}{4})$, or $\frac{13}{40}$

Hence there will be left for the son and daughter the residue, $1-\frac{13}{40}$, or $\frac{27}{40}$, to be divided in the usual manner; and we shall have:—

Son, $\frac{2}{3}$ of $\frac{27}{40}$, or $\frac{18}{40}$
Daughter, $\frac{9}{40}$

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* If the reader has any difficulty in arriving at the fractions $\frac{1}{2}$ and $\frac{13}{40}$, he will see the question worked out, so far, *supra*, 155, 156, 157.

EXAMPLE 5. — (Lost or Missing Persons). — Two daughters, son (lost or missing), son's son, son's daughter.*

On the supposition that the son will be found:—

Two daughters, $\frac{1}{2}$
Son, $\frac{1}{2}$

On the supposition that he will not be found:—

Two daughters, $\frac{2}{3}$
Son's son, $\frac{2}{3}$ of $\frac{1}{3}$, or $\frac{2}{9}$
Son's daughter, $\frac{1}{9}$

As we have to give to each claimant, provisionally, only the smallest portion to which he can become entitled, even if that portion be *nil*, we shall have provisionally:—

Daughters, $\frac{1}{2}$
Reserved portion, $\frac{1}{2}$

The son's son and son's daughter have, therefore, no provisional portion.†

The distribution of the reserved portion will be as follows:—

First case.—If the son be found, the daughters will, of course, retain what they have, and the son will take the whole of the reserved portion.

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* Hed. xiii. 17.

† The Hed. does not go beyond this point, probably because the rest is so very simple; but we have thought it as well to work out the distribution.

Second case.—If the son be not found, the daughters must have their portion made up to what it was on the second supposition; and the son's son and son's daughter will take as on that supposition. Hence the reserved portion will be thus disposed of:—

Two daughters, $\frac{2}{3}-\frac{1}{2}$, or $\frac{1}{6}$
Son's son, $\frac{2}{9}$
Son's daughter, $\frac{1}{9}$

But $\frac{1}{6}+\frac{2}{9}+\frac{1}{9}=\frac{1}{2}$, so that the reserved portion has been fully distributed.

The results may thus be exhibited with the L. C. D.:

	Provisional portions.	From distribution of reserved portion. 1st case.	2nd case.
Daughters (each) .	$\frac{9}{36}$	—	$\frac{3}{36}$
Son . . .	—	$\frac{18}{36}$	—
Son's son . .	—	—	$\frac{8}{36}$
Son's daughter .	—	—	$\frac{4}{36}$

Example 6.—(Lost or Missing Persons).—Husband, two sisters, brother (lost or missing).*

On the supposition that the brother will be found:—

Husband, $\frac{1}{2}$
Two sisters, $\frac{1}{2}$ of (residue) $\frac{1}{2}$, or $\frac{1}{4}$
Brother, $\frac{1}{2}$ of (residue) $\frac{1}{2}$, or $\frac{1}{4}$

* Shar. 102.

On the supposition that he will not be found:—

Husband, $\frac{1}{2}$
Two sisters, $\frac{2}{3}$

But $\frac{1}{2}+\frac{2}{3}=\frac{3}{6}+\frac{4}{6}=\frac{7}{6}$

Hence this is a case of increase, and the denominator must be increased to 7; we shall therefore have:—

Husband, $\frac{3}{7}$
Two sisters, $\frac{4}{7}$

Giving, therefore, to each claimant the smallest portion to which he can become entitled, we shall have, provisionally:—

Husband, $\frac{3}{7}$
Two sisters, $\frac{1}{4}$
Reserved portion, $1-(\frac{3}{7}+\frac{1}{4})$, or $\frac{9}{28}$

The following will be the distribution in the two cases that may occur:—

First case.—If the lost brother be found, the husband must have his portion made up to $\frac{1}{2}$, and the sisters' provisional portion will remain unaltered, while the brother will be entitled to $\frac{1}{4}$. Hence the reserved portion will be thus distributed:—

Husband, $\frac{1}{2}-\frac{3}{7}$, or $\frac{1}{14}$
Brother, $\frac{1}{4}$

But $\frac{1}{14}+\frac{1}{4}=\frac{9}{28}$; therefore the reserved portion has been fully distributed.

Second case.—If the brother be not found, the husband will simply retain his provisional portion; the

sisters must have their portion made up to $\frac{4}{7}$. Hence the reserved portion is thus disposed of:—

Sisters, $\frac{4}{7} - \frac{1}{4}$, or $\frac{9}{28}$

Hence the reserved portion is exactly distributed.

The following are the results exhibited with the L. C. D.:—

	Provisional portions.	From distribution of reserved portion. 1st case.	2nd case.
Husband . .	$\frac{24}{56}$	$\frac{4}{56}$	—
Sisters (each) .	$\frac{7}{56}$	—	$\frac{9}{56}$
Brother . .	—	$\frac{14}{56}$	—

EXAMPLE 7.—(Persons dying together).—Persons dying: a man possessed of property, named Zaid, his daughter, his brother's son, and the son of that brother's son. Persons surviving: son of the daughter, wife and daughter of the brother's son's son. How does the property of Zaid descend? *

According to the "approved" opinion, the property of Zaid will go to his surviving heirs. Zaid leaves no persons surviving him who are actually his heirs, and his property must therefore go to the daughter's son, as one of the 1st Class of D.K., in preference to the brother's son's son's daughter, who is of the 3rd Class. The brother's son's son's wife is not either an heir or a d.k., and can have no claim as a successor of Zaid.

According to Ali and Ibnu Masuud, on the other

* Shar. 103.

hand, the property of Zaid, who stands alone in the highest generation, must be supposed to descend to some of those who died with him; and we have thus, according to the ordinary rules of inheritance:—

Daughter, $\frac{1}{2}$
Brother's son, (residue) $\frac{1}{2}$

The daughter's portion will go to her son as her nearest residuary, she leaving no relations who are sharers in respect of her estate; the brother's son's portion will go to the brother's son's son as his sole residuary, and from the brother's son's son it will descend to his wife and daughter as his heirs. Hence, finally:—

Daughter's son, $\frac{1}{2}$, or $\frac{8}{16}$
Brother's son's son's wife,* $\frac{1}{8}$ of $\frac{1}{2}$, or $\frac{1}{16}$
Brother son's son's daughter,* $\frac{1}{2}$ of $\frac{1}{2}$+(by the return) $\frac{3}{16}$, or $\frac{7}{16}$

EXAMPLE 8.—(Persons dying together—Residuaries for Special Cause).—Persons dying: Kasim, a freedman; Hasan, his C. brother, also a freedman. Each leaves the same amount of property. Persons surviving: mother, daughter, and manumittor, of each.†

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* The Shar. merely says that the moiety is distributed between these two persons according to law; but it will easily be seen that these are the proper portions. As to the important principle which is proved by the wife's taking a share, *vide supra*, 162.

† Shar. 104. Hasan is described as a "younger half-brother." It will be seen that half-brother on the father's side is meant, for the working of the example shows that he and Kasim have different mothers.

According to the "approved doctrine," the property of each deceased person goes to his own surviving heirs thus:—

Mother, $\frac{1}{6}$
Daughter, $\frac{1}{2}$, or $\frac{3}{6}$
Manumittor, (residue) $\frac{1}{3}$, or $\frac{2}{6}$

According to Ali and Ibnu Masuud, Kasim's mother and daughter take their shares, as above, but his residue then goes to Hasan, who is first supposed to be the survivor, and is given to his heirs in the proportions above shown; afterwards Kasim is supposed to be the survivor, and the same process is repeated with respect to him and his heirs. Finally, therefore, the two properties go thus*:—

Kasim's mother, $\frac{1}{6}+\frac{1}{6}$ of $\frac{1}{3}$, or $\frac{2}{9}$
„ daughter, $\frac{1}{2}+\frac{1}{2}$ of $\frac{1}{3}$, or $\frac{2}{3}$, or $\frac{6}{9}$
„ manumittor, $\frac{1}{3}$ of $\frac{1}{3}$, or $\frac{1}{9}$

And— Hasan's mother, $\frac{2}{9}$
„ daughter, $\frac{6}{9}$
„ manumittor, $\frac{1}{9}$

EXAMPLE 9.—(Residuaries for Special Cause).—A slave is purchased and manumitted by two of his daughters, Zubaida and Amina, the former paying $\frac{3}{5}$, and the latter $\frac{2}{5}$, of the purchase-money. He dies, leaving these two daughters and another daughter Safiya.†

* The reader will readily see that, the properties being equal, there is no necessity to distinguish, in the answer, the fractional parts which come from one C. brother from those which come from the other.

† Sir. 12; 15; Shar. 79.

Primarily—

Three daughters (as sharers), $\frac{2}{3}$; each $\frac{1}{3}$ of $\frac{2}{3}$, or $\frac{2}{9}$

Residue, $1-\frac{2}{3}$, or $\frac{1}{3}$

But Zubaida and Amina, as residuaries for special cause, will take the residue between them in proportion to their contributions; therefore we have, secondly:—

Zubaida (in addition to her share), $\frac{3}{5}$ of $\frac{1}{3}$, or $\frac{1}{5}$

Amina (similarly), $\frac{2}{5}$ of $\frac{1}{3}$, or $\frac{2}{15}$

Hence, finally:—

Zubaida, $\frac{2}{9}+\frac{1}{5}$, or $\frac{19}{45}$

Amina, $\frac{2}{9}+\frac{2}{15}$, or $\frac{16}{45}$

Safiya, $\frac{2}{9}$, or $\frac{10}{45}$

EXAMPLE 10.—(Persons who may not inherit).—Wife, mother, two sisters, two U. sisters, son rendered incapable of inheriting.*

According to the author of the Sirájiyyah, a person who may not inherit has no effect on the others, so that the case will be worked out as if there were no son.

Wife, $\frac{1}{4}$

Mother, $\frac{1}{6}$

2 sisters, $\frac{2}{3}$

2 U. sisters, $\frac{1}{3}$

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* Sir. 15; 19. This example is important as illustrating two remarkable points relating to U. sisters: one, that they are not excluded by the mother, though she is their medium of relationship; the other, that their rights are not affected, like those of C. sisters, by the presence of sisters. *Vide supra*, 125, 126.

But $\frac{1}{4}+\frac{1}{6}+\frac{2}{3}+\frac{1}{3}=\frac{3+2+8+4}{12}=\frac{17}{12}$

Hence this is a case of increase, and the denominator must be increased to 17; we shall thus have:—

Wife, $\frac{3}{17}$
Mother, $\frac{2}{17}$
2 sisters, $\frac{8}{17}$, each $\frac{4}{17}$
2 U. sisters, $\frac{4}{17}$, each $\frac{2}{17}$

According to Ibnu Masuud, however, a person who may not inherit "excludes imperfectly," in other words, his presence may lessen the share of another. Now, a wife's share, when there is any child, is not $\frac{1}{4}$, but is lessened to $\frac{1}{8}$. Hence we have:—

Wife, $\frac{1}{8}$
Mother, $\frac{1}{6}$
2 sisters, $\frac{2}{3}$
2 U. sisters, $\frac{1}{3}$

But $\frac{1}{8}+\frac{1}{6}+\frac{2}{3}+\frac{1}{3}=\frac{3+4+16+8}{24}=\frac{31}{24}$

Hence this is a case of increase, and the denominator must be increased to 31. We shall then have:—

Wife, $\frac{3}{31}$
Mother, $\frac{4}{31}$
2 sisters, $\frac{16}{31}$, each $\frac{8}{31}$
2 U. sisters, $\frac{8}{31}$, each $\frac{4}{31}$

EXAMPLE 11.—(Persons who may not inherit).—A woman converted to the faith dies, leaving a husband

and two U. brothers who are believers, a son who is still an infidel, and other residuaries who are believers.*

According to the doctrine of the Sirájiyyah, the son will be considered non-existent; and we have:—

Husband, $\frac{1}{2}$, or $\frac{3}{6}$
Two U. brothers, $\frac{1}{3}$, each $\frac{1}{6}$
Residuaries who are believers, $1-(\frac{1}{2}+\frac{1}{3})$, or $\frac{1}{6}$

According to Ibnu Masuud, the son will cause the husband to take $\frac{1}{4}$ instead of $\frac{1}{2}$, and we shall have:—

Husband, $\frac{1}{4}$, or $\frac{3}{12}$
Two U. brothers, $\frac{1}{3}$, or $\frac{4}{12}$, each $\frac{2}{12}$
Residuaries who are believers, $1-(\frac{1}{4}+\frac{1}{3})$, or $\frac{5}{12}$

* Shar. 80, 81.

CHAPTER XV.

OF WILLS, AND DISPOSITIONS BY SICK (DYING) PERSONS.

Preliminary, 217. — Limits of Testamentary Power, 220.—Acceptance of Bequests, 233.—Fractional and other Bequests, 234.—Declaration in favour of Brother, 247. — Bequests of Other Persons' property, 247.—Bequests of Use or Produce, 249. —Legatees by Description, 254. — Bequests for Pious Purposes, 257.—Retraction of Bequests, 259.—Executors; their Functions and Liabilities, 261.—Dispositions by Sick (dying) Persons, 280.

PRELIMINARY.—As the right of inheritance, according to Moohummudan law, takes effect, generally, subject to any disposition by will that the deceased owner may have made, provided that such disposition do not exceed the limits prescribed by law,* the legatees and the per-

* *Vide infra*, 220, &c.

sons entitled by inheritance are looked upon as being, in a manner, partners in the estate of the deceased.* And it is also considered that "bequest resembles inheritance, as the legatee succeeds to the property of the deceased in the manner of an heir."† Since, therefore, the rights of legatees and inheritors are thus closely connected and mutually dependent on one another, it may not be out of place, in a treatise relating to inheritance, to give some account of the law relating to wills. We propose to do so, accordingly, in this chapter, premising that the words "will," "bequest," and "legacy" will be used indiscriminately according to convenience, as the absence of any formal requisites to the efficacy of a will makes it impossible to draw any marked distinction (perhaps we may say, any distinction at all) between any one of these words and either of the other two.

A will (*waseeyat*) or bequest becomes effectual on the death of the testator (*moosee*), and not before, thus differing from an acknowledgment of debt by a sick person, which takes effect immediately.‡

There is no prescribed form or manner of making a will; if one person say to another, "Give this article of mine, after my death, to a particular person," these words are sufficient to constitute a will, and to authorise

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* Hed. lii. ii. 11–13.

† Hed. xx. iv. 6.

‡ Hed. lii. i. 9 ; xxv. iii. 8. As to such acknowledgments generally, *vide supra*, 191, &c.; *infra*, 280.

the person thus addressed to carry it out.* It seems clear, from the illustrations and expressions used by Moohummudan writers, that there is no distinction, as regards testamentary disposition, between real and personal property; that a bequest by word of mouth is equally valid with a bequest in writing; that a person may bequeath property either specifically, by way of pecuniary legacy, or as a fractional part of his estate; and that, if a man make several bequests to different persons at the same or at different times, they will all take effect concurrently, provided that he does not bequeath, in the aggregate, more than the amount allowed by law.†

A bequest in general terms, *e.g.* "a third of my property," is not restricted to any particular kind of property; thus, such a bequest to be given "in alms to

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* Hed. lii. Preliminary definitions. The person so addressed becomes a *wasee*, or executor. As to the functions of such a person, *vide infra*, 261, &c.

† Hed. lii., *passim;* Shar. 56, 57. The words "bequest" and "legacy" are used here, and will be used throughout, in the sense of bequest *or* devise; for, if there is no distinction between real and personal property, there can be none between a bequest or legacy and a devise. As to reasons for assuming that there is no distinction between real and personal property, *vide supra*, 7. Allusions to land are not very common in the Hedaya, but it is mentioned as the subject of a bequest, Hed. xx. iv. 6; lii. i. 19; as the subject of inheritance, Hed. xxvi. iii. "Section" (second). 2; as the subject of purchase and sale, Hed. i. vi. 8; as the subject of grant, i. vi. 11, &c. As to the case of several bequests, see distinction where they are made to the same person, *infra*, 236, 237.

the distressed" takes effect, *pro tanto*, on the whole of the property, not only on that which is subject to *zakat*.*

LIMITS OF TESTAMENTARY POWER.—A person of full age may, generally, dispose by will as he pleases of a third part, but no more,† of the residue of his property after payment of funeral expenses and debts. Funeral expenses and debts take precedence of any such disposition,‡ and a bequest is therefore void if a person who makes it is deeply involved in debt; but a legacy primarily invalid by reason of debts will become valid if the creditors relinquish their claims.§ An infant cannot make a will; and even if, having purported to do so, he afterwards lives to attain to maturity, the will does not thereby become valid; moreover, an infant (as distinguished from a slave or a mokatib) is under an absolute incompetency, so that even if he purport to make a bequest referring to the age of maturity, *e.g.* with the words "whenever I reach the age of maturity," it is nevertheless invalid.‖

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* Hed. xx. iv. 6. As to *zakat* (which means "a contribution of a portion of property assigned to the use of the poor, as a sanctification of the remainder to the proprietor," Hed. i. Preliminary Definition), see Hed. i. *passim*.

† It will be seen hereafter that, under some circumstances, a man may bequeath the whole, *vide infra*, 229, 230; and that, generally, a will purporting to bequeath more than a third will be valid to the extent of a third, *vide infra*, 234.

‡ Sir. 1; 2; Shar. 56, 57; Hed. lii. i. 1–3, 14, 15.

§ Hed. lii. i. 14.

‖ *Ibid.* 15.

Full age or maturity, in Moohummudan law, is identical with puberty; and, conversely, infancy is the state of one who has not attained puberty.* There is some controversy as to the precise circumstances under which puberty is to be considered as established, but it seems to be generally admitted that it may be established by the existence of the ordinary physical signs; and the author of the Hedaya seems to incline to the opinion that, in the absence of such signs, it is established at the age of eighteen in a male, and at the age of seventeen in a female.† Under no circumstances, however, can it be established under the age of twelve in a male or that of nine in a female.‡ When a person who is approaching the age of puberty declares himself or herself to be adult, the declaration must be credited, and such person at once becomes subject to all the rules of law respecting adults.§

The following rules are laid down (in addition to the above general principles) with respect to persons who may or may not make a will, persons in whose favour a will may or may not be made, property which may be the subject of a will, and the like.

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* Hed. xxxv. ii. "Section," note; *vide* also the Hedaya, *passim*, where it will be found that no distinction of age is alluded to except the natural division between puberty and impuberty.

† Hed. xxxv. ii. "Section". 1, where the opinions of various dissentients are enumerated, and the physical signs described.

‡ *Ibid.*

§ Hed. xxxv. ii. "Section". 2.

A woman, equally with a man, can make a will. This is shown from the statement that a female apostate can make a will; that statement being made, not as distinguishing such a person from other women, but as distinguishing her from a male apostate.*

A zimmee* may make a bequest, generally, to another infidel, whether of the same or of a different religion from himself, for all unbelievers are considered as of one class; but he may not make a bequest to a hostile infidel. The testamentary power of a zimmee is subject to the same limitations as that of a Mussulman, so that bequests to a person entitled by inheritance are invalid, and bequests to any other person are invalid so far as they exceed one-third of the testator's property.‡

A zimmee may make a bequest in favour of a Mussulman, and a Mussulman in favour of a zimmee; but a

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* Hed. lii. vi. 5, and *vide infra*, 224.

† A zimmee is an alien infidel (that is, an alien person not of the Moohummudan religion) who has become a subject of a Mussulman Government under the following circumstances:—When an alien infidel comes into a Mussulman territory, under protection, the Imám must give him notice that if he remains in it beyond a specified time he must pay a capitation tax (*jizyat*). If the alien returns to his own country before the time specified, he does not become liable to the tax; but if he remains beyond that time he is liable to it, and he is then called a zimmee, *vide* Hed. ix. vi. "Section". 1, 4, 5, 7; i. vi. 9; ix. viii. 10, &c. An alien infidel woman is placed in a similar position by marrying a zimmee, and is called a zimmeea; but a man cannot become a zimmee by marrying a zimmeea.

‡ Hed. lii. vi. 10–1

bequest to a hostile infidel is, it would appear, always invalid.* A zimmee's testamentary right is limited, as above mentioned, to a third part of his property, for the reason that he has agreed to conform to the laws of the Mussulmans in all temporal concerns.†

If a zimmee make a bequest for a purpose held pious both by Mussulmans and by zimmees, as burning a lamp in the Holy Temple (of Jerusalem), or waging war against the infidel Tartars, it is valid, whether it is made in favour of specific persons or not; but if the bequest be made for a purpose held pious by Mussulmans, but not by zimmees, as the erection of a mosque, burning a lamp in a mosque, or making a pilgrimage to Mecca, it is invalid unless it be made in favour of some particular persons, in which case it is valid as a bequest to such persons coupled with a counsel to them therewith to erect a mosque, &c. If it be made for a purpose held pious by neither—or rather held sinful by both—as the support of singers or dissolute women, it is invalid unless made in favour of particular persons. Lastly, if it be made for a purpose deemed pious by zimmees but not by Mussulmans, as the building of a church or synagogue, or the slaughter of hogs to feed the poor of their sect, it is valid altogether according to Abu Hanifa, as being according to the faith of the testator; but invalid altogether according to Abu Yusuf and Muhammed, as being sinful.‡

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* Hed. lii. i. 9. † Hed. lii. vi. 10.

‡ Hed. lii. vi. 3.

A bequest by a Mussulman or a zimmee in favour of a moostámin,* or *vice versâ*, is valid, for a moostámin, so long as he resides in a Mussulman country, is considered in the light of a zimmee. In one respect, indeed, a moostámin has even a wider power than a Mussulman or a zimmee; for, as his relations possess no cognizable rights of inheritance on account of their being in a hostile country, he may bequeath the whole of his property to a Mussulman or to a zimmee instead of being restricted to a third; but if he bequeath a part only, the remainder will go to his inheritors, even if they reside in a hostile country.†

A bequest by a Christian or a Jew to the effect that his house shall be converted after his death into a church or synagogue, specifying the particular sect for whom it is intended, is valid, with the usual limitation that it can only take effect to the extent of a third of the testator's property. If, on the other hand, the testator does not specify the particular sect, the bequest is valid according to Abu Hanifa, but invalid according to Abu Yusuf and Muhammed.‡

The will of a female apostate is valid altogether. But if a male apostate purport to make a will, Abu Hanifa

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* A moostámin (as the word is here used) is an alien infidel who has come into a Mussulman territory, under protection, and has not yet become a zimmee, *vide* Hed. iv. xv. "Section 5". 3, note; lii. vi. 9; and *vide* Bail. Dig., 171.

† Hed. lii. vi. 6, 7, 9.

‡ *Ibid.* 2, 3.

is of opinion that it remains in suspense, becoming valid on his repentance, but null on his death or expatriation. Abu Yusuf and Muhammed, however, maintain that such a will is valid altogether.* A mere free-thinker or innovator, who has not proceeded to open and avowed infidelity, is not incapacitated from making a will, for the law regards his apparent state, which is that of a Mussulman, and does not look upon him as an apostate.†

An immediate bequest by an absolute slave is necessarily invalid, for everything that he has belongs to his master‡; moreover, it is laid down that slaves "are not competent to act in any respect *sui juris*."§ A similar bequest by a mokatib is invalid, according to the authors of the Hedaya, even though he leave enough other property to discharge his covenanted ransom. It is said, however, by some, that Abu Yusuf and Muhammed espouse the opposite opinion.‖ Either an absolute slave or a mokatib, however, (as distinguished from an infant,) possesses competency in himself to perform this and other acts, obstructed merely by the right of the master; and therefore, if such a person make a bequest with reference to the period when the bar shall be removed, *e.g.* with the words "whenever I am free," it is valid if he afterwards become free.¶

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* Hed. lii. vi. 4, 5.

† Hed. lii. vi. 4, and note, *ibid.*

‡ Hed. lii. i. 15.

§ Hed. ii. i. 2; and *vide* Hed. ii. ii. 16.

‖ Hed. lii. i. 16.

¶ Hed. lii. i. 15. As to meaning of "absolute slave" and "mokatib," *vide supra*, 170, 182.

A man may, of course, bequeath his own absolute slave; and if the slave be afterwards killed, the legacy will be executed from the compensation received for his blood. If, however, the master sell him, the sale operates as a retraction of the bequest.*

A man may manumit his slave by will, and this may be done by a direction to the persons entitled by inheritance to manumit such slave.† It would seem, too, on principle, that if he should merely say "I direct that my slave A. be free after my death," or the like, the slave would be free from the moment of his death; for it is not easy to see how the executor or the inheritors could raise any claim in opposition to his expressed intention.

If a man direct by will that "his heirs emancipate his slave at his decease," and the slave, after the death of the testator, commit an offence requiring compensation, the inheritors may surrender the slave to the "avenger of offence" in satisfaction of such compensation; and if they determine to do so, the slave ceases to be part of the testator's property, and the direction to emancipate him is void. If, however, the inheritors consent to pay a "redemptionary atonement," the burden of such atonement will fall entirely on their own property, and the direction will remain in force."‡

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* Hed. lii. ii. 27; and, as to subject of retraction generally, *infra*, 259.

† Hed. lii. iii. 6.

‡ *Ibid.*

A bequest to a person, whether an inheritor or a stranger, from whom the testator has received a mortal wound, either purposely or accidentally inflicted, is invalid; and, in like manner, if a person who has already made a bequest is afterwards killed by the person to whom it is made, the bequest is invalid; but in both these cases the bequest will become valid if the persons entitled by inheritance give their consent.*

As a result of the doctrine just stated, if there be a joint bequest to A. and B., and A. be the murderer of the testator, B. takes one-half, and the murderer takes nothing.†

A bequest to a fœtus in the womb is valid, for a fœtus can take by inheritance, and, by parity of reasoning, he can take a legacy. But, in order that the legacy may take effect, it is essential that the birth should happen within six months from the date of the will. A bequest of a fœtus is valid under similar circumstances. If a man bequeath his female slave, with the exception of her child in the womb, the exception is valid; but a bequest of the female slave simply will carry the fœtus with it.‡

A bequest to a person who is dead at the time of

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* Hed. lii. i. 6, 7. Abu Yusuf opposes the last opinion, but Abu Hanifa and Muhammed both support it, so that the point may be considered as established. — *Conf.* law of inheritance under similar circumstances, *supra*, 182.

† Hed. lii. ii. 25.

‡ Hed. lii. i. 17, 18. *Conf.* rules as to inheritance of unborn persons, *supra*, 150; where it will be seen that the shortest period of gestation, according to Moohummudan law, is six months. As to bequest of pregnant slave, *vide* also *infra*, 246, 251, &c.

making such bequest is absolutely void, the reason being, apparently, that there can be no acceptance on the part of the legatee. And it results from this doctrine that if a person bequeath "a third of his property," without further words, "to A. and B.," and it should prove that A. was dead at the time of making the bequest, B. will take the whole legacy, whether the testator was aware of the decease of A. or not. If, on the other hand, the testator directs that a third "be divided, as a legacy, between A. and B.," the latter, under the circumstances before supposed, will take only half the legacy; for the words used by the testator clearly indicate that each should have a half, and, as A. is dead, the bequest of one-half to him fails entirely.*

The statement that a bequest to a person who is dead at the time of making such bequest is void would seem, at first sight, to lead to the curious inference that a bequest to a person not dead at that time is operative, even though he be dead at the time of the testator's decease. But this position, which would certainly be rather startling to logical minds, is negatived by another passage, which shows that, if a legatee die between the making of the legacy and the death of the testator, the legacy is void and the property goes to the inheritors.†

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* Hed. lii. ii. 14, 15; lii. v. 5. It may be as well to warn the reader not to trust to the marginal note of paragraph 15, which is incorrect. As to the doctrine of acceptance generally, *vide infra*, 233.

† Hed. lii. i. 25.

It would have been sufficient, therefore, to say, generally, that a legacy fails if the legatee be dead at the time of the testator's death; but the statement of law above referred to is introduced, apparently, with the view of bringing forward the doctrine that it fails when the legatee is dead at the time of the making, even if the testator is not aware of his death.

It will be seen later that if a man make a bequest to two persons, one of whom is an inheritor, and therefore cannot take, the other person takes only half of the legacy.* The reason why it is otherwise in the case of a bequest to a living and a dead person is that a dead man has not the inherent capacity of being a legatee,† and cannot therefore cause any "obstruction" to the gift, which thus operates entirely in favour of the living person. The principle is well illustrated by likening such a bequest to a bequest purporting to be made to a living man and an inanimate object, as "to A. and a wall."‡

Notwithstanding the general limitation of testamentary disposition to one-third of the property,§ the owner may dispose of any larger portion, or even of the whole, by will (subject, of course, to funeral expenses and debts), if there are no persons (other than the public treasury)

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* *Vide infra*, 231.

† A living person, on the other hand, has that capacity normally, though it is taken away, incidentally, by the circumstance of his being an inheritor.

‡ Hed. lii. ii. 14, 24.

§ *Vide supra*, 220.

entitled by inheritance.* It must be remembered that persons who may be entitled by inheritance include not only relations, but also residuaries for special cause, successors by contract, and persons acknowledged as kinsmen through another, so that any of these will take precedence of a legatee except as to one-third of the property.†

Again, notwithstanding the limitation above mentioned, a bequest of more than a third becomes valid if the persons entitled by inheritance, having arrived at the age of maturity, give their consent after the testator's death. Such consent, once given, cannot be annulled; but a consent given in the testator's life-time is ineffectual, because it precedes the establishment of the right, and may be annulled on the testator's death.‡ The principle of these rules is, that the objection to the validity of a bequest of more than a third is founded merely on the right of the persons entitled by inheritance, and therefore ceases to operate when they themselves agree to forego that right. By a logical sequence, the consent before the testator's death is inoperative, for it precedes the establishment of the right.§

The right of bequeathing a third of the property is

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* Sir. 2; 3; Hed. lii. i. 4.

† For enumeration of the various persons who may inherit, *vide supra*, 163.

‡ Hed. lii. i. 4.

§ *Ibid.*

founded on the principle that a man must be allowed, by leaving something out of his own family, to atone for past deficiencies. But, subject to this right, the inheritors are held to have an interest in the whole of the property, and, accordingly, any bequest to a person or persons entitled by inheritance is primarily invalid, as being an injury to the other persons so entitled, but it becomes valid if those persons give their consent after the testator's death.* It follows that if a man make a joint bequest to A. and B., A. being entitled by inheritance, B. will take half, and the bequest will fail as to the other half. It has been seen that it is different if a joint bequest be made to a living and a dead person, for in such case the living person will take all. This distinction is based on the principle that a dead person, being altogether incapable of succeeding to a legacy, cannot "obstruct" a living person, while a person entitled by inheritance possesses the capacity of being a legatee, and therefore, though unable to take in the actual case proposed, for want of the consent of the other persons so entitled, is capable of "obstructing" another.†

In all cases in which an otherwise invalid bequest may be rendered valid by the consent of the persons entitled by inheritance, the legatee is held to take the

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* Hed. lii. i. 5, 8, and *vide supra*, 230.

† Hed. lii. ii. 24, and *vide supra*, 228, 229. *Conf.* the rule of the law of inheritance, which recognises, in a person who is himself excluded, the capacity of excluding others, *supra*, 127.

property from the testator, and not from those persons; for the will is the occasion of the property, and the consent is only the removal of a bar. Hence it follows that seisin is not necessary to the establishment of the legatee's proprietary right, as it would be if he took it by gift *inter vivos*.*

If some of the persons entitled by inheritance give their consent to a bequest, and others withhold it, the bequest becomes valid in proportion to the amount of the portions of those who consent, and invalid in proportion to the amount of the portions of the others.†

In deciding who are inheritors and who are not, for the purpose of pronouncing on the validity of a bequest, regard must be had to the time of the testator's death, not to the time of making the will, for "the efficacy of a will is established after the death of the testator." Thus, for instance, if a man make a bequest to a woman who is not married to him at the time, but who is afterwards married to him so as to be an heir at the time of his death, the legacy fails.‡ Thus, also, if a man make a bequest to his son who is at the time a Christian, and such son become a Mussulman before the testator's death, and thus become entitled by in-

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* *Ibid.*, and Hed. lii. i. 5. As to the necessity of seisin to the completion of a gift *inter vivos*, *vide* also Hed. xxx. i. 2.

† Hed. lii. i. 8.

‡ *Ibid.*, and lii. ii. "Section". 2. *Secus* as to acknowledgment by sick person, *ibid.*, and *vide supra*, 191, &c.; *infra*, 280.

heritance, the bequest is void.* And, in like manner, if the son, at the time of the bequest, be an absolute slave or a mokatib,† but obtain his liberty, and be free at the time of the testator's death, the bequest is void.‡

ACCEPTANCE OF BEQUESTS. — Acceptance, express or implied, is necessary to establish the property of a legatee in a legacy, and a legatee is at liberty to accept or reject at pleasure. Acceptance or rejection, in order to have any effect, must be signified after the death of the testator; for it is only on his death that the will or bequest takes effect; and it follows that a legacy will be effectual if accepted after the death, even though the legatee may have purported to reject it during the life-time, of the testator.§

Express acceptance is not defined, the words being considered by the author of the Hedaya not to require explanation. Implied acceptance is deemed to exist when the legatee has died without having in terms accepted or rejected; for the bequest is complete, so far as regards the testator, by the testator's death, and was only suspended in its effect in deference to the legatee's right of rejection, so that on the legatee's death it falls into his property as a matter of course.‖

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* Hed. lii. ii. "Section". 3. It will be remembered that unbelievers (which word includes Christians) cannot inherit, *vide supra*, 184. The son, therefore, while a Christian, is not considered to be entitled by inheritance.

† *Vide supra*, 170, 182.

‡ Hed. lii. ii. 4.

§ Hed. lii. i. 10, 12. *Secus* as to inheritance, *ib.*; and *vide supra*, 10.

‖ Hed. lii. i. 13.

The principle on which acceptance is held necessary to the complete proprietary right in a legacy is that the property is considered to come to the legatee, not by succession and descent, as in the case of inheritance, but by the establishment in him of a right of property *de novo*. It follows that if he finds any defect in the property he is not entitled to reject it, as a person entitled by inheritance would be. Thus, if the legacy consist of a slave purchased by the testator, and the legatee find some fault or defect in the slave, it is not in his power to return the slave to the seller, as a person entitled by inheritance might do. Conversely, nothing can be returned to the legatee on account of a defect. Thus, if a person bequeath the whole of his property, and afterwards sell a part of it, and die, and the buyer discover a defect in the part that he has bought, he has not the power of returning it to the legatee, though he might return it to a person entitled by inheritance.*

FRACTIONAL AND OTHER BEQUESTS.—If a person purport to bequeath more than the one-third allowed by law,† either by naming a particular sum or sums exceeding a third, or by bequeathing, in terms, a larger fractional part, the bequest is not void, but takes effect, generally, to the extent of one-third and no more, the

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* Hed. lii. i. 12. As to inheritance, *vide supra*, 10, 11.

† As to the rule which limits testamentary power to one-third of the estate, *vide supra*, 220.

various legacies (if there are several) abating in proportion to their amount.* Thus, if "one-third" be bequeathed to A. and "one-third" to B., A. and B. will each take one-sixth; if "one-third" to A. and "one-sixth" to B., A. and B. will take one-third between them in the ratio $\frac{1}{3}:\frac{1}{6}$, or 2:1, in other words, A. will take $\frac{2}{3}$ of $\frac{1}{3}$, or $\frac{2}{9}$, and B. $\frac{1}{3}$ of $\frac{1}{3}$, or $\frac{1}{9}$; if 30 dirms to A. and 60 dirms to B., while the whole property consists only of 90 dirms, A. and B. will take one-third, or 30 dirms, between them, in the ratio 30:60 or 1:2, in other words, A. will take $\frac{1}{3}$ of 30, or 10, and B. $\frac{2}{3}$ of 30, or 20.†

On the same principle, if the testator bequeath "the whole" to A., and, afterwards, "one-third" to B., Abu Yusuf and Muhammed are of opinion that, as in the cases above given, A. and B. will take in proportion to their nominal bequests, and that A. will have $\frac{3}{4}$ of $\frac{1}{3}$, or $\frac{1}{4}$, and B. $\frac{1}{4}$ of $\frac{1}{3}$, or $\frac{1}{12}$. Abu Hanifa, on the other hand, considers that A. and B. should take equally, as if "one-third" had been bequeathed to each, the excess over one-third in A.'s legacy being, in his opinion, a circum-

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* Exceptions to the general rule as to abatement occur in the case of bequests for pious purposes, some of which take precedence of others if the third of the property be insufficient for all. As to this subject, which need not be further mentioned here, *vide* Hed. lii. iii. "Section". &c.; and *infra*, 257.

† Hed. lii. ii. 1, 2, 4. In these, and all similar cases, the reader will of course remember that the whole bequest will take effect if the persons entitled to inherit give their consent after the testator's death. From these and similar cases the doctrine stated above (*supra*, 219), that several bequests to different persons will all take effect concurrently, is necessarily inferred.

stance which should not be taken into consideration, because such excess is contrary to law, and utterly void unless the persons entitled to inherit give their consent.*

The case of a testator bequeathing "a third of his property" and "a sixth of his property" to the same person, is viewed in a different light from that of two bequests to different persons.† Instead of a third of the estate passing in any event, the legatee takes $\frac{1}{3}$ or $\frac{1}{6}$, according as the bequest of one-third or one-sixth is later in time. It is immaterial, for the purposes of this doctrine, whether the bequests are made before the same or a different company.‡ The question naturally arises, whether this particular statement as to "a third" and "a sixth" is to be taken as indicating a general doctrine that the later of two fractional bequests to the same person takes effect to the exclusion of the former, and it is submitted that it must be so understood. The position is not likely, perhaps, to be disputed, except in the case of two bequests which are together less than $\frac{1}{3}$, *e.g.* $\frac{1}{6}$ and $\frac{1}{9}$; but if that case should arise, the legatee might, perhaps, argue that both bequests ought to take effect, as the rule against bequeathing more than $\frac{1}{3}$ would not thereby be violated. It seems to be a valid answer to this argument, that if it were merely desired

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* Hed. lii. ii. 5.

† As to the latter case, *vide supra*, 235.

‡ Hed. lii. ii. 9, 10.

to cut off the excess over $\frac{1}{3}$, the legatee in the case stated in the Hedaya would take $\frac{1}{3}$ in either event, instead of taking only $\frac{1}{6}$ when the bequest of "a sixth" is the later in date. It may be added that the Hedaya gives as the reason for the legatee taking $\frac{1}{3}$ when the bequest of "a third" is the later, that "the sixth is included in the later bequest of a third." Consequently the reason for his not taking $\frac{1}{3}$ in the other supposed event is, that the third is *not* included in the later bequest of "a sixth." The principle set forth in the Hedaya is, therefore, that if there be two fractional bequests to one and the same person, the earlier only takes effect so far as it is included in the later; and this seems to be a principle depending on the presumed intention of the testator, and entirely independent of the rule which limits bequests to a third of the testator's property. It need hardly be said, however, that if the later of two bequests be greater than a third, it must necessarily be cut down to a third like any other legacy.

It might be supposed, by analogy, that if a man bequeaths a specific article to A., and afterwards the same article to B., without other words, the later bequest would operate as a retraction of the earlier; but this is not so, for the article will belong to both, as partners, and will be divided between them if of a divisible nature.*

* Hed. lii. i. 24; lii. v. 11; and *vide infra*, 259, where the doctrine of retraction is set forth more in detail.

When a person who is poor bequeaths "a third of his property," and afterwards becomes rich, as the bequest does not take effect till after his death, the legatee will be entitled to a third of the property belonging to him at the time of his decease, whatever may be the amount of such property. And the result is the same if he be rich at the time of making the bequest, and afterwards become poor and rich again.*

Similarly, if the testator bequeath a "third of his goats," having no goats at the time, or having only goats which are afterwards all destroyed or lost before his death, the legatee will take nothing; on the other hand, if he afterwards acquire goats, the legatee will take a third of them†; for the validity or invalidity of the legacy depends on his being possessed of goats at the time of his decease.‡

In like manner, if he bequeath "one of his goats," and have no goats at his decease, the legatee will take nothing.§ If, on the other hand, the testator use the

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* Hed. lii. ii. 16.

† *Conf. infra*, 241, 242, where it appears that if the testator have goats at the time of the bequest of a third, and two-thirds are lost or destroyed, the legatee will take the whole of the remaining third.

‡ Hed. lii. ii. 17. In this and many similar instances, the reader's judgment will probably lead him to the conclusion that the specific fraction or the particular description of article is merely illustrative, and that the principle involved must be held to extend to other fractions and other kinds of property.

§ Hed. lii. ii. 18.

expression "a goat of his property," the legacy then has relation to his property generally, and not to his herd, and the legatee will take the value of a goat if the testator die without leaving any goats.* Lastly, if the testator merely leave "a goat," without reference either to his herd of goats or to his property generally, it is an open question whether the legatee will take the value of a goat or take nothing at all.†

If a man bequeath "a third of his property," and leave, among other property, a slave, and the legatee and inheritors both agree that the testator has emancipated the slave, but the former assert that the emancipation was made in health, and the latter maintain that it was made during sickness,‡ the contention of the inheritors, in the absence of evidence, will prevail, and in such case the value of the slave must form a deduction from the third which is bequeathed. But if the legatee can prove his contention by evidence, the value of the slave will then be deducted from the whole estate, and the legatee will take a complete third of what remains.§

If a man bequeath "a part of his property," without specifying the amount, the legacy is not invalidated for its uncertainty, but is held to take effect. But, as the

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* Hed. lii. ii. 18. "A goat of his property" is not an English phrase, and conveys no particular meaning in itself; but the principle involved may be gathered from the context.

† *Ibid.*

‡ As to dispositions by sick persons, *vide supra*, 191, &c.; *infra*, 280.

§ Hed. lii. iii. 7.

inheritors are the representatives of the testator, it is entirely in their discretion to fix the amount, in the same manner as the testator might do if he were living.* If, however, the testator bequeath a "portion" (*sehm*) of his estate, the rule is different, for in such case the legatee, according to Abu Hanifa, will take $\frac{1}{6}$; but, according to Abu Yusuf and Muhammed, he will take the smallest portion allotted to any inheritor, provided that such portion be not greater than $\frac{1}{3}$, but if it be greater than $\frac{1}{3}$, then he will take only $\frac{1}{3}$, unless the inheritors consent to his taking more. For instance, if a man leave a wife, a son or brother, and a legatee of a "portion," according to Abu Hanifa the legatee will take $\frac{1}{6}$, although the "smallest portion" is $\frac{1}{8}$ in one case, and $\frac{1}{4}$ in the other. But according to Abu Yusuf and Muhammed, the legatee takes $\frac{1}{8}$ in the former case, and $\frac{1}{4}$ in the latter. The difference of opinion on this subject arises from a doubt as to the meaning of the word *sehm*, which is considered by Abu Hanifa to signify a sixth, but, by Abu Yusuf and Muhammed, to signify "a portion allotted to an heir." †

It is not distinctly stated whether the legatee is, by this rule, imported, as it were, into the category of inheritors, so that all the fractions will be calculated as

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* Hed. lii. ii. 8. The practical result of the rule is simply this, that the legatee will take under the will and not by way of gift, and that seisin will not be necessary to his proprietary right, *vide supra*, 232.

† Hed. lii. ii. 7.

fractions of the whole estate (after payment of funeral expenses and debts), or whether the legatee is first to take his fractional part out of the whole, and the inheritors are then to take theirs out of what remains, as in the case of an ordinary legacy. For instance, in the case given above, it is not stated whether the portions will be (according to Abu Hanifa), legatee, $\frac{1}{6}$ of the whole; wife, $\frac{1}{8}$ of the whole; son, (residue) $\frac{17}{24}$ of the whole; or whether, on the other hand, they will be, legatee, $\frac{1}{6}$ of the whole; wife, $\frac{1}{8}$ of what remains, or $\frac{5}{48}$ of the whole; son, (residue) $\frac{7}{8}$ of what remains, or $\frac{35}{48}$ of the whole. But the Hedaya, in describing the doctrine of Abu Hanifa, says that "the remainder" is to be divided between the wife and son "according to the ordinances of the law," and it seems probable that this rule applies also to the doctrine of Abu Yusuf and Muhammed, and indicates a division, according to the ordinary rules of inheritance, of that which remains after deducting the portion of the legatee.

If a man bequeath three exactly similar articles which he actually has at the time of the bequest, and two of such articles are afterwards lost or destroyed, the legatee takes the one which remains. Thus, if he bequeath three dirms, and two of such dirms are afterwards lost, the legatee will take the remaining dirm. And, if he merely bequeath a third of any number of homogeneous articles, having such articles at the time, as, "a third of his dirms," having at the time three thousand, or "a third of his goats," having at the time three goats, or a third of any articles possessed by him, which are

similar in weight, capacity, or the like, and two-thirds be lost or destroyed, the legatee will take the remaining one thousand dirms, the remaining goat, or the remaining third part of other articles, as the case may be.*. But if the bequest be of "one of these three," three articles of different kinds, as a gown, a slave, and a house, being specified, then, if two be lost or destroyed,—or, similarly, if a man bequeath the third of his three slaves or three houses, and two of the former die, or two of the latter are destroyed,—the legatee can only take a third of the remaining article or of the value thereof. The distinction proceeds on the principle that the legatee and the persons entitled by inheritance are, in a manner, partners; and that when there are several homogeneous articles in which partners have an interest, each partner may be said to have a right pervading the whole of each article; while, on the other hand, if the articles are not homogeneous, each partner may insist on the division of each article, so that no individual partner has a right pervading the whole of any one article. Hence, in the case of homogeneous articles, the legatee and the inheritors may be considered as having rights pervading the one fraction which remains, but the legatee's right prevails, because of the general rule that a bequest takes precedence of a claim by inheritance. In the case

* Hed. lii. ii. 11, 12, *Conf. supra*, 238, where it appears that, if the testator bequeath a third of his goats, having none, and acquire some before his decease, the legatee takes a third.

of the three specified articles, on the other hand, a right over the whole of the portion which remains has never arisen, and, consequently, the legatee can only take one-third of that portion, in accordance with the general rule which limits bequests to a third of the estate, and therefore, primarily, to a third of each article which composes it.

In accordance with these principles, if a man leave "a third of his clothing," and two-thirds be afterwards destroyed, the effect of the legacy would seem to depend on the nature of the clothing. If it consists of homogeneous articles, the legatee will take all the articles that remain; but if the garments are of different kinds, he will only take a third of what remains.*

If a man make a pecuniary bequest and then die, leaving property consisting partly of ready money and partly of debts due to him, the legacy must at once be paid in full, if it do not exceed one-third of the ready money; but if it exceed such third, only a third of the legacy must be now paid, and, as the debts are recovered from time to time, a third of each

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* Hed. lii. ii. 12. This paragraph contains the words "if the remaining third exceed the whole of the property," obviously an error for "do not exceed," &c., for this and all other special rules are, of course, governed by the general rule that testamentary power only extends to a third. It will be found on referring to the paragraph that the rule as to dirms and other homogeneous articles is referred to; and, in treating of such articles, the Hedaya expressly recognises the rule of limitation to one-third.

debt must be paid to the legatee until the whole bequest is satisfied. The reason is, "that the legatee is, as it were, a partner with the heirs; and, therefore, if his claim in particular were discharged with the ready property (by its being applied to the payment of the whole legacy), an injury would be occasioned to the right of the heirs, as ready money is allowed to be preferable to money that is due." *

If a man bequeath a specified sum of money to A. and a like sum to B., and then declare that C. shall be a "sharer" or "participator" with them, C. will take a third of each sum; in other words, he will share equally with A. and B.; but if the sums bequeathed to A. and B. be unequal, C. will take half of each sum. Thus, if the sums bequeathed to A. and B. be respectively 100 dirms, A., B., and C. will each take a third of 200; but if the sums be respectively 400 and 200 dirms, A. will take 200, B. 100, and C. 300. The reason given is rather singular. It is said that it is the intention of the testator to put C. on an equality with A. and B., and as that is possible in the first case, it must be done; but it is not considered possible in the second case, and therefore C takes half from each, in order that they may be "as nearly on an equality as possible." † The fallacy of this reasoning is, that it is founded on inconsistent uses of

* Hed. lii. ii. 13. The reader must be on his guard against the marginal note of this paragraph, which is incorrect.

† Hed. lii. ii. 22.

the word "equality"; the equality in the first case being between the whole, and in the second between parts, of C.'s portion, and the portions of A. and B. respectively. It would seem a more equitable and more consistent mode of division to give C. one third of the whole, of which fraction two-thirds should be taken from the portion of A., and one-third from that of B.* Such a course, however, does not seem to have suggested itself to the author of the Hedaya.

If a person bequeath three garments of different values, the best to A., the next in value to B., and the worst to C., and one of the three be lost, without its being known which, the inheritors may, at their option, either declare to each that "his share is lost," or make over the two remaining garments to the legatees. In the former case the bequest is void for uncertainty, for "the Kazee cannot pass a decree concerning a thing unknown." But in the latter case the bequest continues in force, and A. will have two-thirds of the better garment, B. one-third of each garment, and C. two-thirds of the worse garment.†

If a person bequeath a sum for the performance of a pilgrimage to Mecca, and, after his death, the executor divide off the sum from the portion of the inheritors, and take possession of it, and it be afterwards lost or destroyed either in his charge or in that of the person whom he has appointed to perform the pilgrimage, ac-

* The portions of A. and B., 400 and 200, being in the ratio 2:1.

† Hed. lii. ii. 26.

cording to Abu Hanifa, a third of the remaining property of the deceased must be appropriated for the pilgrimage. But, according to Abu Yusuf, if the sum lost was a third of the original property, nothing must be taken from the inheritors; but if it was less, enough must be taken to make up a third. Lastly, according to Muhammed, the heirs are to contribute nothing in either case.*

If a person in one and the same sentence bequeath a female slave to one person and the child in her womb to another, or a leathern bag to one person and the dates contained in it to another, or a ring to one person and the stone in it to another, "the first legatee gets his legacy, but the legatee of the contained article is not entitled to anything." It does not appear very clearly whether the contained article goes with the containing article, or passes by inheritance.† If the second bequest be made after an interval of silence, Abu Yusuf is of opinion that the result is the same; but Muhammed maintains that in such case the containing article passes to the first legatee, and the contained article is shared equally between the two.‡

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* Hed. lii. vii. 21.

† Hed. lii. v. 11. According to Mr. Baillie, however, this passage is erroneously translated by Mr. Hamilton, its true purport being that "each legatee is entitled to what has been bequeathed to him, and the legatee of the vessel has no right to anything that is contained in it."—Bail. Dig., 656, and *ibid.*, note.

‡ *Ibid.*

The effect of a bequest of a pregnant slave under various circumstances has been mentioned earlier in this chapter.*

DECLARATION IN FAVOUR OF BROTHER.—It may be as well to mention, in this place, that if, after two sons have made partition of their father's property, one of them declare that his father had bequeathed a third of the property to the other, the former must make over a third (in the opinion of the author of the Hedaya, but a half in that of Muhammed) of his own portion to the latter.† On principle it would seem that this rule (depending, apparently, on the doctrine of acknowledgment, *vide* Hed. xxv.) should apply equally to any other co-inheritors.

BEQUESTS OF OTHER PERSONS' PROPERTY.—A bequest of a sum of money belonging to another person is not valid, unless the person in question confirm it by his consent given after the death of the testator ; and such person, even after giving his consent, may refuse to pay the money if he thinks proper, for such a consent is purely voluntary and gratuitous.‡

If, on the other hand, a man bequeath to A. a specific apartment in a house belonging to him (the testator) in

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* *Supra*, 227; *vide* also *infra*, 251, &c.

† Hed. lii. ii. 29.

‡ Hed. lii. ii. 28. *Secus* as to consent of persons entitled by inheritance, *vide supra*, 230. The effect of this rule is, probably, that if the consent be given the legatee will take by way of legacy under the will, and not by gift from the proprietor, so that seisin will not be necessary, *vide supra*, 232.

partnership with B., a partition must be made of the house. Then, according to the "two Elders," if the apartment fall within the share of the testator, A. will take it as his legacy; if not, he must have from the testator's share a number of cubits equal to the size of it. But, according to Muhammed, A will, in the first case, only take half of the apartment, and, in the second, only half the number of cubits equal to it. Muhammed's reason, stated briefly, is this, that the testator has bequeathed that of which only half belongs to him, and that the bequest fails as to the other half. The two Elders, on the other hand, argue that the testator had a right to half of the house by partition, and that he must be taken to have meant to bequeath a portion of that half, consisting of the apartment or its equivalent.*

. In accordance with the principle that a man cannot make a valid bequest of another man's property,† a bequest by a man of "his son's portion of inheritance" is not valid, for it is a bequest of that which, after his death, when the will takes effect, will be the property of another. But if a man desire that a legatee should have an equal portion with that which his son will take by inheritance, he may bequeath "an equivalent to his son's portion," and such a bequest will be valid.‡

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* Hed. lii. ii. 27.

† This principle may safely be assumed from *supra*, 247, although only a "sum of money" is actually mentioned.

‡ Hed. lii. ii. 6.

BEQUESTS OF USE OR PRODUCE.—A bequest may be made of the use (or service, as in the case of a slave) or of the produce, of a thing, as distinguished from the thing itself*; but the more approved opinion is, that a bequest of produce is merely a bequest of money, so as not to give a right to actual use or occupation; and this opinion is further enforced by the consideration that, if any debt of the testator should be discovered some time after the death of the testator, it may be paid by restitution of the money produce (as, for instance, the rent of a house), "which could not be done in the case of his" (the legatee's) "having had the actual use." The result will be, that the persons entitled by inheritance may be relieved of a charge which might otherwise improperly fall upon them."†

A person may bequeath the use of a house or the service of a slave, or, in like manner, the rent of a house or the wages of a slave, either for a definite or for an indefinite period‡; and such a bequest will be carried out in accordance with the following rules:—

If the value of the article do not exceed that of a

* Hed. lii. v. 1, &c.

† Hed. lii. v. 6. In order to understand this argument it is necessary to bear in mind that a debt takes precedence both of the legacy and of the claims by inheritance. Accordingly, if a debt is discovered, the legatee and the inheritors should, no doubt, contribute towards the payment, in the ratio 1 : 2, for the legatee is supposed to have taken $\frac{1}{3}$ of the property, and the inheritors $\frac{2}{3}$. Now if the legatee has "had the actual use," he has exhausted what came to him from the testator, and the whole debt may have to be paid by the inheritors.

‡ Hed. lii. v. 1, 6.

third of the whole property, it must be delivered to the legatee, who may use it or receive the produce (as the case may be) during the prescribed term, if he live so long (and, presumably, during his life if the period be indefinite), but after the expiration of the term he must restore it to the persons entitled by inheritance from the testator, and, similarly, on his death before the expiration of the term (and, in the case of an indefinite period, presumably on his death at any time), it goes to the persons so entitled. But if the article constitute the whole of the testator's property, it must be divided, if of a divisible nature (as a house), between the legatee and the persons entitled by inheritance, in the proportion of one-third to two-thirds, unless they agree to use it in turns, viz. the legatee one day and the persons entitled by inheritance two days, alternately; and if it be indivisible (as a slave), it must be used in turns in the manner above mentioned.* According to the more approved tradition, the inheritors, in the case of such division as above mentioned, may not sell their two-thirds, and this for two reasons; first, it is possible that so much additional property of the testator may afterwards be discovered that the legatee may be entitled to

* Hed. lii. v. 1-3, 5. It is not stated what is to happen if the article constitute more than a third, but less than the whole, of the property; but it may be assumed that, in such a case, the same principles would be followed, the respective rights being adjusted according to the proportionate value of the article to that of the whole property.

the use or produce of the whole house (or other divisible property) as being no longer more than a third; secondly, the sale of two-thirds might be injurious to the interests of the legatee in the one-third, so that he has a right to restrain them from selling.* A legatee of the use of an article may not let it out on hire; for this reason among others, that usufruct is not property.†

If a man bequeath the person of a slave to one and the service of the slave to another, both bequests hold good; and, in like manner, if only the service of the slave is bequeathed, his person belongs to those who are entitled by inheritance.‡ The legatee of the service of a slave must not take him away from the city of the testator, except when his (the legatee's) family reside in another city, and the value of the slave does not exceed a third of the testator's estate.§

With respect to bequests of produce, as distinguished from bequests of use, the following points may be noted:—

A bequest of a particular female slave, *primâ facie*, includes, "dependently," a child in her womb; but the actual effect of such a bequest depends on the circumstances of the case. If the testator bequeath such a slave, without more words, and die, and the slave give birth to a child after partition has taken place and the legatee has accepted the legacy, the child, as well as the

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* Hed. lii. v. 4.
† Hed. lii. v. 7.
‡ Hed. lii. v. 10.
§ Hed. lii. v. 8.

mother, belongs to him, irrespectively of any question as to the value of the child. And, if the child be born before partition and acceptance, he is entitled to both if their aggregate value do not exceed a third of the whole property. But if the value exceed a third, the legatee, according to Abu Hanifa, will take the mother, subject to her value not being more than a third, and so much of the value of the child as will make his legacy up to a third; while according to Abu Yusuf and Muhammed, he will take from their two values, in proportion to their respective amounts, enough to make up a third. Thus, if the slave and her child be each worth 300 dirms, and the remaining property be worth 600 dirms, according to Abu Hanifa the legatee will take the mother and 100 dirms deducted from the value of the child; but according to Abu Yusuf and Muhammed, he will take 200 dirms from the value of the mother and 200 from that of the child.*

There is some doubt as to the effect of a bequest of a female slave to one and of the child in her womb to another. This subject, however, has already been dealt with.†

A man may bequeath the future, as well as the existing, produce of a tree or garden; but the actual wording of the bequest is a matter of material importance. A bequest of the "produce" of a garden, without any

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* Hed. lii. i. 18; lii. ii. 30.

† Hed. lii. v. 11, *vide supra*, 246. As to bequest of pregnant slave, *vide* also *supra*, 227.

particular term being specified, gives the legatee a right to the produce during his life-time; a bequest of the "fruit" of a garden, simply, carries only the fruit which is there at the time of the testator's death; but if the word "perpetually" be added, the legatee will be entitled to the fruit during his life-time.* On the other hand, a bequest of the wool, milk, or progeny, of a sheep, passes only what may be in existence at the time of the testator's death, even if the word "perpetually" be used.† The reason given for this apparently capricious distinction is, that "ordained contracts" with respect to non-existent fruits are good in law, but such contracts as to non-existent wool, milk, or young, of a sheep, are not, and consequently any bequest of such articles, when non-existent, is invalid.‡

If a man bequeath a year's produce of a slave or house, and die leaving no other property, the legatee is entitled to a third of the year's produce, but cannot require the inheritors to make a division of the house with him, in order that he may collect the third himself. This rule is based on the principle that a legatee of produce has property in such produce only, and not in the article itself. §

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* Hed. lii. i. 17; lii. v. 12.

† Hed. lii. v. 13.

‡ *Ibid.* As to what are ordained contracts, *ibid.*, note.

§ Hed. lii. v. 9. It would seem to follow from this, that usufruct, which gives a right of division (*supra*, 250), is property; but that position is denied in a passage previously referred to, *vide supra*, 251.

LEGATEES BY DESCRIPTION.—We next proceed to notice certain bequests made to persons by description and not by name, generally to classes or groups more or less vaguely indicated, which bequests are construed according to certain rules which have no application to bequests made to specified individuals in the ordinary way.*

If a person make a bequest to the "heirs" of A., the legacy must be distributed according to the rule of the law of inheritance which gives each male as much as two females; but in the case of a bequest to the "*awlad*" (children) "of the race" of A., males and females take equally.†

A bequest to the testator's "neighbour," according to Abu Hanifa, is a bequest to the person whose house is immediately adjoining, whether the actual proprietor of the house or not, whether a Mussulman or a zimmee, whether male or female, and even if an absolute slave. According to Abu Yusuf and Muhammed, it comprehends all the inhabitants of the vicinity who belong to the same mosque, with the exception of absolute slaves.‡

A bequest to a man's *as'har* is a bequest to all the

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* It may be as well to mention that the Hedaya has no technical name for this description of legatee; we have therefore fixed upon the expression "legatees by description" as a convenient designation.

† Hed. lii. iv. 10, 11. It may be presumed, however, that in the former case U. brothers and sisters will take equally, as the only object seems to be to conform to the law of inheritance.

‡ Hed. lii. iv. 1.

relations of his own wife, his father's wife, and his son's wife, within the prohibited degrees. Should "the wife" be, at the time of his death, in her *edit* from a reversible divorce, her relations will not be prevented from taking; but if she be irreversibly divorced, they will not take, as such a divorce annuls the marriage entirely. The words "the wife" apply, no doubt, to the father's and son's wives, equally with the wife of the testator, for the reason is equally applicable to all these.*

A bequest to the testator's *khatn* is a bequest to the husbands of his female relations within the prohibited degrees, and to the relations within the prohibited degrees of those husbands; and it is to be observed that freemen and slaves, and near and distant relations, are all on the same footing so long as they are comprehended in this definition.†

A bequest to the *ahl* of A., according to Abu Hanifa, is a bequest to the wife of A.; but according to Abu Yusuf and Muhammed, it is a bequest to every individual of A.'s family entitled to maintenance from A.‡

A bequest to the *ahl* of the house of A. is a bequest to A.'s father and (presumably, *true*) grandfather, and to all the descendants from the remotest progenitor, on the pa-

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* Hed. lii. iv. 3. As to prohibited degrees, *vide infra*, Chap. XVI.; as to *edit* of divorce, *vide* Hed. iv. xii. 1, &c.

† Hed. lii. iv. 4. Some commentators, it is remarked parenthetically, limit the word "khatn" to the husbands.

‡ Hed. lii. iv. 6. As to who are relations entitled to maintenance, *vide supra*, 191.

ternal side, professing the Mussulman faith. A bequest to the *al* of A. is a bequest to the *ahl* of the house of A.*

A bequest to the *ahl* of A.'s *nish* (race) or *kirrabit*, is a bequest to all those descended from A.'s ancestors in general; but a bequest to the *ahl* of A.'s *jins* includes only those descended from the paternal side as distinguished from those descended from the maternal.†

For the meaning of bequests to the testator's *akraba*, to the "orphans, blind, lame, or widows" of a particular race, and to the testator's *mawlas*, the reader is referred to the Hedaya‡; but the opinions are not recorded here, as they are too vague and conflicting, apparently, to be of any practical use.

If a man bequeath a third of his property to a class of unlimited number, as "the distressed," it is the opinion of the "two Elders" that the whole may be given to one of the class, *e.g.* to one distressed person; but Muhammed is of opinion that it must not be given to fewer than two. In obedience to this rule, if the bequest be made "to A. and the distressed," according to the "two Elders," A. and the "distressed" will take the property equally; but according to Muhammed, A. will take only one-third, and the distressed, two-thirds. In like manner, if the bequest be made to testator's three am walids, to the distressed, and to beggars, according to

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* Hed. lii. iv. 7.

† *Ibid.*

‡ Hed. lii. iv. 5, 8, 12; but as to meaning of mawlas, *vide supra*, 164, 174.

the "two Elders" the am walids will take three-fifths, or one-fifth each, the "distressed" two-fifths, and beggars two-fifths; but according to Muhammed, the am walids will take three-sevenths, or one-seventh each, the "distressed" two-sevenths, and beggars two-sevenths.*

BEQUESTS FOR PIOUS PURPOSES.—Bequests "to the rights of God," or, as paraphrased by the translator of the Hedaya, "for pious purposes," are of two kinds, namely, such as are "absolutely incumbent and ordained," and such as are "not incumbent duties." Of the former kind are pilgrimage, prayers, and the like; of the latter, the erection of a mosque, of a receptacle for travellers, or of a bridge.†

If a man bequeath property for pious purposes of both descriptions, those of the former kind must, generally, take precedence of the latter in the order of execution, whatever may be the order in which the testator has mentioned them.‡ Consequently, if a third part of the testator's property is not sufficient to execute all such bequests, those which are of the former kind will have the preference. If, however, the bequests are all of the

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* Hed. lii. ii. 19–21. We have used the words "a third of his property," because they are used in the Hedaya; but the same rules are applicable, no doubt, to a bequest of any smaller fraction.

† Hed. lii. iii. "Section". 1, 3. A note in the Hedaya at this place states that the former kind (*farz*) include all indispensable duties, more particularly the five primary duties, viz., purification, prayer, alms, fasting, and pilgrimage.

‡ Hed. lii. iii. "Section". 1.

former, or all of the latter, kind, the order in which the different objects are mentioned by the testator must be followed.*

It is to be observed that each bequest for pious purposes is to be considered as of the nature of a distinct legacy, in other words, of a legacy left to a different person.† It is a necessary inference from this, that if all are of one description (*i.e.* all "incumbent" or all "not incumbent") they will abate *inter se* if they amount in the aggregate to more than a third of the property.

If the bequest be, "that a pilgrimage incumbent upon the testator be performed on his behalf after his death," the heirs must depute a person from the city of the testator, with such conveyances and equipments as would have been suitable according to his rank if he had performed it himself, provided the property be sufficient. If the property be not sufficient, a person must be sent from a place nearer to Mecca; the actual distance to be proportioned to the amount of the property.‡ If the testator commence the pilgrimage before his death, and die on the road, having made a bequest as above mentioned, according to Abu Hanifa the pilgrimage must be made by a person from his own city, in like manner as if it

* Hed. lii. iii. "Section". 2, 3. The rules mentioned in our text are clearly adopted by the author of the Hedaya, though he mentions one or two dissentient opinions.

† Hed. lii. iii. "Section". 3.

‡ Hed. lii. iii. 4.

had not been commenced by him; but according to Abu Yusuf and Muhammed, the person is to be sent from the place at which the testator had arrived in the prosecution of his intention. The same difference of opinion exists as to a pilgrimage undertaken on account of any person by another person who dies on the road. It is, of course, admitted by all, that if the deceased person has merely set out towards Mecca on a trading journey, and died on the way, the fresh pilgrimage must be commenced from the city of the testator.*

RETRACTION OF BEQUESTS.—A bequest may be rescinded or retracted, either expressly or by implication. Express retraction may be effected by the words "I retract what I have bequeathed," "I depart from my will," or the like, or by declaring the will null, but not by desiring the execution of it to be deferred till some time after the death of the testator, or by declaring it unlawful or usurious. It is a doubtful question whether the mere denial of a bequest operates as a retraction, Abu Yusuf maintaining that it does, and Muhammed that it does not. Retraction may be implied by adding to or otherwise altering the subject matter of the bequest. Addition operates as a retraction where the thing added is so connected with the article bequeathed that the latter cannot be delivered without it. Thus if the testator mix oil with flour, erect a building on land, dress cotton which was undressed, or use cloth for lining or

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*Hed. lii. iii. 4.

covering a robe, such acts will operate to retract a bequest previously made of the flour, land, cotton, or cloth, as the case may be. Alteration, as distinguished from addition, operates as a retraction when it is such as, performed on the property of another, would have the effect of terminating the right of the proprietor; as, slaughtering, flaying, roasting, or boiling a goat, fabricating a vessel from a piece of copper, grinding corn into flour, or making iron into a sword. Instances of additions and alterations which do not so operate are, plastering the wall of a house, and undermining its foundations. Retraction is also implied by any act which occasions an extinction of the property of the testator, as, selling or giving the article bequeathed, even though the testator should afterwards become repossessed of it by purchase or by retraction of the gift. Washing a garment is not a retraction, for it is usual to wash a garment before giving it away. The bequest to B. of an article which has been before bequeathed to A. may sometimes operate as a retraction of the earlier bequest, but the intention must be clearly shown by such words as "I bequeath to B. the ——— which I formerly bequeathed to A."; for if the testator make the second bequest without alluding to the previous disposition, the article belongs to A. and B. equally as partners, and is divided between them if it be of a divisible nature. It is an exception, however, to the last-mentioned kind of retraction, that if B. be not alive when the bequest is made to him, the bequest to A. holds good entirely; because, as we have seen above, the be-

quest to B., which would otherwise have operated as a retraction, is absolutely void; but if B. be alive, and afterwards die in the life-time of the testator, both bequests fail; the bequest to A., because of the retraction, and the bequest to B., because of his death before the testator. It may be as well to mention that, if a slave be bequeathed and be afterwards killed by a stranger, the legacy does not fail, but is executed from the compensation money received for his blood.*

EXECUTORS: THEIR FUNCTIONS AND LIABILITIES.—A testator may appoint one or two persons (if two, either at the same or at different times), to carry his will into execution, and he may do this either with reference to a particular bequest, or generally; thus it is sufficient to say to such person or persons, "Give this article, after my death, to such a one," or "I appoint you my executor." Any person so appointed is called a *wasee;* but it will be convenient to use the word "executor," as the position and duties are, in many respects, similar to those of an executor in England.†

It may be as well to mention, *in limine*, that a will may clearly be made without any such appointment, for "the magistrate" is primarily charged with the duty

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* Hed. lii. i. 19–25; lii. ii. 27; lii. v. 11; and *vide supra*, 227, 228, 237, &c.

† Hed. lii., preliminary definitions; as to two executors, lii. vii. 11, 15, 16. There would seem to be no reason, in principle, why more than two should not be appointed; but we do not find any actual allusion to such a state of things in the Hedaya. The Fatáwa Alamgíri seems to adopt this view, *vide* Tag. Lect. 1874, 98,

of paying legacies, and of distributing the residue among the persons entitled by inheritance.*

A person whom a testator purports to appoint executor is not obliged to accept the appointment, for no man has the power of compelling another to interfere in his concerns. Nor, in the event of his not accepting it, is he under any obligation to decline it. He may, however, if he think proper, accept or decline it in the presence of the testator. If he so accept it, he may not decline it afterwards, either in the absence of the testator during his life-time, or after the testator's death; for in either case the testator, having relied on his acceptance, would be deceived. From this it must be necessarily inferred, though it is not actually stated in the Hedaya, that he may afterwards decline it, or, in other words, recall his acceptance, in the presence of the testator; for the testator will not in such case be deceived. If he neither accept nor decline in the testator's life-time, he is at liberty, after the death of the testator, to accept or decline, as may be most agreeable to him. Should he, having neither accepted nor declined, dispose by sale of any part of the testator's property immediately after the death of the testator, he will be deemed to have accepted, and the executorship will thereby become obligatory. Should he, on the other hand, in the like case, decline after the testator's death, the Kazee may set him aside and appoint another executor, after which he cannot un-

* Sir. 1, 2; 1, 2.

dertake the office even if willing to do so; but until the Kazee has thus interfered, he may accept the office, notwithstanding his previous refusal, for the mere refusal does not annul the executorship.* It may reasonably be inferred from the foregoing statements that a refusal in the presence of the testator is a complete rejection of the appointment, and that a man cannot after such refusal (unless the testator again appoint him at a subsequent time) accept the executorship after the testator's death.

If a reprobate (*fasik*) or an infidel be appointed executor, the appointment is primarily valid, but it is the duty of the Kazee to annul it and appoint some other person. The same rules hold, generally, as to a slave; but if a man appoint his own slave, such appointment is invalid *in se* if any of the persons entitled by inheritance have arrived at the age of maturity, for such persons have power to sell their property in the slave, and may thus render him incapable of acting except by the consent of the purchaser. If, however, the persons entitled by inheritance are all infants, the appointment is valid according to Abu Hanifa, but void according to Abu Yusuf and Muhammed, and the latter opinion is favoured by the author of the Hedaya. The validity of the appointment of a mokatib,

* Hed. lii. vii. 1–4. A Kazee is a person appointed by the ruling power to pass decrees and decide on and enforce legal claims; in other words, a judge or magistrate, *vide* Hed. xx. i. 5, &c.

even if there are adult inheritors, does not seem to be disputed.*

If it appear to the Kazee, on due examination, that a person appointed executor is "utterly incapable of the office," he must release him, and appoint another in his place, that course being advantageous both to the executor and to the estate; and, in like manner, the Kazee must dismiss an executor and appoint another person in his place if he is clearly ascertained to be "culpable," which word appears here to mean culpable as regards the estate, or, in other words, untrustworthy, for it will be seen immediately below that the Kazee may not dismiss a capable and trustworthy executor. But the Kazee must not release an executor merely on his (the executor's) own allegation of his incapacity, for such an allegation is often made falsely in order to escape the burden of the executorship; nor must he dismiss an executor on the complaint of all or part of the inheritors as to his being "culpable," until his guilt is clearly ascertained. In a word, the Kazee is not at liberty to dismiss any executor who is perfectly equal to the discharge of his office, and at the same time trustworthy

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* Hed. lii. vii. 5, 6. As to what is the age of maturity, *vide supra*, 221. For definition of "mokatib," *vide supra*, 170, note. It may be well to mention that a mokatib cannot be sold. In addition to the rules which we give from the Hedaya, the reader will find some practical rules from the Fatáwa Alamgíri, as to infants and other persons who may or may not be executors, &c., in Tag. Lect. 1874, 89, &c.

therein; he may, however, take the intermediate course of associating another person with an executor, in order that the duties of the office may be properly executed, if the latter, without being altogether incompetent, is yet not entirely equal to the duties of the office.*

If a man who has children die without appointing an executor, the father of the deceased represents him, as being the person most nearly related to the children and most interested in their welfare. But if the deceased have appointed an executor, the power of such executor is superior to, and precedes, that of the father of the deceased in relation to the management of the property of the children. As regards the persons of the children, however, the power of their father's father is superior, at least in some respects; *e.g.* it is he, in preference to their father's executor, who has the right to contract the infant children in marriage.†

If an executor of a deceased person appoint another person to be his own executor, and die, the person so appointed is executor of the first deceased as well as executor of the deceased executor.‡

If one of two joint executors die, without having appointed the other executor to act for him, the Kazee must appoint another in his room; for the intention of

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* Hed. lii. vii. 7–10.

† Hed. lii. vii. 32, 33; *vide* also Hed. lii. vii. 18.

‡ Hed. lii. vii. 18. Apparently this only applies to a sole executor, the case of the death of one of two executors being governed by different rules, *vide infra*, next paragraph.

the testator was, evidently, that there should be two persons entrusted with the management of his property. But if the deceased executor have appointed his co-executor, or, it would seem, a third person, to act for him, the better opinion is that it is not incumbent on the Kazee to appoint another in the room of the deceased executor.*

When a testator has appointed two executors at the same time,† it is the opinion of Abu Yusuf that one of them may, in all cases, act without the other; but this view would, probably, be disapproved by the Court, for Abu Hanifa and Muhammed are of opinion that one of such executors can act without the other only in things which require immediate execution, which are matters of obvious duty, or in which the interest or advantage of the estate is concerned. Of the first kind are, paying funeral expenses, and buying food or clothes for the testator's infant children; of the second, restoring a deposit, an usurped article, or a thing purchased by the testator under an invalid contract, preserving the property, discharging the testator's debts, paying legacies, or emancipating slaves, if directed to do so (*i.e.* to pay

* Hed. lii. vii. 16, 17. It is not quite clear, however, whether the right to appoint a third person is recognised by the author of the Hedaya as generally received doctrine, or is merely mentioned as meeting with the individual approval of Abu Hanifa.

† The reason for our adding the words "at the same time" (which do not occur in the Hedaya) will be understood from the next paragraph.

or emancipate, as the case may be) by the testator; of the third, instituting a suit to enforce the rights of the testator, accepting a gift for an infant (for otherwise the infant may die without acceptance, and the gift will then be lost for want of seisin*), selling goods where there is an apprehension of their spoiling (as in the case of fruit, or the like), and collecting the scattered property of the testator.†

A question has been raised, whether, when a testator has appointed two executors at different times, they stand in the same position with two executors appointed at the same time, or whether each of them can perform all acts whatsoever of executorship independently of the other. The former opinion seems the more reasonable, and is reported to have been maintained by Abu Hanifa and Muhammed in opposition to Abu Yusuf, on the ground that a will only takes effect on the death of the testator, and at that time both are executors at the same time, though they were appointed at different times.‡

We find no very precise definition of the powers of a

* A gift is not complete without seisin, *vide supra*, 232.

† Hed. lii. vii. 11–14. As to accepting a gift for an infant, the Hedaya uses the words "an act which neither may perform singly"; but it is obvious that this is an error for *either*. "Accepting" is here used, evidently, in a literal sense. It may be as well to mention that *any* person may pay funeral expenses, sell property likely to spoil, or collect and preserve scattered property; and that a mother or nurse may accept a gift for an infant. —*Ibid.*

‡ Hed. lii. vii. 15.

sole executor, or of two joint executors acting together; but, judging from the account given above of the more limited powers of one of two joint executors, they would seem, *à fortiori*, to be very large, and to involve everything that can be necessary for collecting, preserving, and managing the estate, and discharging the claims upon it. It is clearly implied that an executor may sell for the benefit of an infant inheritor, or for the purpose of paying a creditor.* It would seem, too, that an executor has a general power of converting property of the testator into money; for it is laid down that if he sell part of the testator's property before accepting the appointment, and even before he is aware of it, the appointment is thereby confirmed, and the sale is valid†; and, *à fortiori*, a sale, it would seem, must be valid when made by an executor who has accepted the appointment with his eyes open and has deliberately acted upon it. And it is laid down, also, that an executor, under ordinary circumstances,‡ may sell a slave forming part of the estate, in the absence of the creditors, in order to discharge the debts of the deceased, "for as the testator might have done so during his life-time, the executor, as his representative, is entitled to do the same." It is added that "the ground on which this proceeds is, that the right of the creditors to the effects of the de-

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* Hed. xx. iv. 13,,

† Hed. xx. iv. 8; lii. vii. 3.

‡ As to exception in case of the slave being in debt, *vide infra*, 269.

ceased lies, not in the things themselves, but in their worth; and the worth of the slave is not annihilated by the sale, as the price (which is in reality the worth) still remains." It is clear that this reasoning applies equally to other kinds of property, the specific instance of a slave being given, probably, because a slave is indivisible, and therefore forms a more frequent subject of sale than property of other descriptions. Finally, according to Sir William Jones, it is laid down by Sharif that a house on which there is a lien must not be sold to defray even funeral expenses, whence it may, perhaps, reasonably be inferred that a house or any other property on which there is no lien may be sold for funeral expenses, and, consequently, may be sold by an executor, since the payment of funeral expenses is one of his functions.*

It may, however, be here observed that notwithstanding what has been stated above as to the sale of a slave, such a sale, if the slave be in debt, is not valid if made in the absence of the creditors, for the creditors have a claim to the earnings of his labour, which would be annihilated by the sale of him.†

Apart from an executor's own inherent power by virtue of his office, it is clear that an executor may be directed by the Kazee to sell a slave, and presumably, therefore, to sell any other article forming part of the testator's estate, for the purpose of discharging the testator's debts.‡

* Sir. Preface, ix. † Hed. lii. vii. 24.
‡ Hed. xx. iv. 12.

It seems clear that an executor is generally charged with the duty of dividing the property of the deceased, after payment of funeral expenses and debts, into the two grand portions, usually one-third and two-thirds, to which the two bodies of claimants, viz. the legatees and inheritors, are respectively entitled,* and with that of taking possession of legacies with respect to which any duty (such, for instance, as causing a pilgrimage to be performed) is prescribed by the testator. And it must be inferred, from the above description of the powers of one of two joint executors, that such one executor cannot, alone, make the division, but that the two, if there be two, must act together.†

An executor is considered to be a successor to the deceased; and, until he has made the division between the legatees on the one hand and the inheritors on the other, the power of preserving the whole of the property, not only the part that will belong to the legatees, is lodged in him as a trustee. Consequently, if any of the property "perish in his hands" previous to such division, it seems that no compensation will be due from him, either to the legatees or to the inheritors; but these

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* Hed. lii. vii. 19, 20, 21.

† *Supra*, 266, 267. It may be objected that one alone may pay legacies or emancipate slaves; but it will be observed that he is only stated to be able to perform these acts when directed to do so by the testator; hence it must be inferred that he may pay a particular legacy, &c. when expressly directed to do so, but that it is not within his power to enter upon the general division of the property, *vide supra*, 266.

two classes respectively, instead of taking the whole in certain proportions, will merely take what remains in the same proportions. He may make the division when there are infant or absent inheritors, and may take possession of their portions; for, being, equally with them, a successor, he is a competent litigant in their behalf; and, therefore, if these portions perish in his hands, such inheritors will have no claim to participate with the legatees. But if there are infant or absent legatees, he has no right to proceed to the division and to take possession of their portions, for a legatee is "not a successor to the deceased in every respect," but is "constituted a proprietor by a new and supervenient cause"; and the executor cannot, therefore, stand as litigant on his behalf. It follows that if the legacy were to perish in his (the executor's) hands, the legatee would be entitled to compensation out of the portion allotted to the inheritors. And it is further observed that, in case the legacy were to "perish" as above mentioned, the executor would, as a trustee, be exempt from having to pay compensation, just as if the loss had happened before the division.* The result of this reasoning seems to be that, as the remedy of the infant or absent legatees would be, in any case, against the inheritors, and not against the executor, the whole property must be handed over to the inheritors, provided they are adult and not absent, to be held by them abso-

* Hed. lii. 19, 20.

lutely, so far as their own portions are concerned, but subject to the rights of the infant or absent legatees as regards the portions of such legatees.*

It would seem that, if money bequeathed for the purpose of a pilgrimage be "lost or destroyed," even after division, in the hands of the executor, or of the person appointed by him to perform the pilgrimage, the executor does not have to pay any compensation.† The same principle would seem to apply to all bequests which place on the executor any sort of duty which makes it necessary for him to keep the bequeathed property in his own hands.

The expressions "perish in the hands," "lost or destroyed in the hands," &c., are used without any defining words; but it may perhaps be fairly assumed, both from the form of the expressions themselves, and from a general consideration of the just and logical character of Moohummudan law, that they are meant to indicate an involuntary and unavoidable loss, not one which is owing either to dishonesty or to wilful neglect on the part of the executor. It may be observed, *per contrà*, that the chapter on executors in the Hedaya, while stating plainly that the Kazee may remove an executor for incapacity or culpability,‡ does not contain any comprehen-

* This view receives confirmation from the rule in a subsequent passage as to the action of the Kazee, on the motion of the inheritors, in the case of an absent legatee. *Vide infra*, 278.

† Hed. lii. vii. 21. See allusions to this subject, *supra*, 258, 270.

‡ *Vide supra*, 264.

sive rules respecting the payment of compensation to legatees or inheritors for any loss occasioned thereby. The absence of such rules, however, may be due merely to a tacitly assumed doctrine that an executor is a creditor in respect of what he receives, and that his liability, except when he is protected, as mentioned in particular events, by his character as a trustee, is the same as that of any other creditor; and this supposition receives countenance from the following statements as to certain circumstances under which he is not so protected.

An executor, notwithstanding his admitted immunity in certain cases, is liable to a purchaser for the value of a slave whom he has sold in obedience to a direction given to him by the testator to sell the slave and bestow the price in charity, if the slave proves to be the property of another, and the price received has been lost or destroyed in the executor's hands; but he may indemnify himself from the estate of the deceased, entirely, if it be sufficient, and if not, as far as it will go. According to the better opinion, he takes his indemnity from the estate generally; but Muhammed maintains that he takes it out of the third which is liable to be used for testamentary purposes. The executor, like any other creditor, will have to bear the whole loss if the testator leave no other property.* If, however, the executor make the sale by order of the Kazee, for the purpose of satisfying the creditors of the deceased, and the slave

* Hed. lii. vii. 25.

either prove to belong to another person, or die before the delivery to the purchaser, and the price be lost after being received by the executor, the executor, if appointed by the Kazee (and, it would seem, *à fortiori*, if appointed by the testator), will be liable to the purchaser just as if he had sold by order of the testator, but he will have his indemnity from the creditors, who, in their turn, will be indemnified from the testator's estate so far as it will go.*

An executor is accountable to the purchaser in like manner if he sell a slave which has fallen to the share of an infant child of the deceased,† and the slave prove to be the property of another, and the price be lost in the executor's hands; but in such case he will get his indemnity from the infant's portion of the inheritance, and the infant will have "an equivalent" from the portions of the other inheritors. Although the words "an equivalent," literally, would seem to indicate an exact replacement of the amount lost, this is not the sense in

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* Hed. xx. iv. 12. The *à fortiori* argument seems to follow necessarily from the reason given, viz. "because, having been appointed by the Kazee to act as executor to the deceased, he is therefore *a representative of the deceased*, and not of the Kazee, and hence, in the same manner as the deceased would have been responsible under such circumstances, in case he had himself made the sale during his life-time, so also is the executor for the sale made after his death."

† "A child of the deceased"; but this clearly means an infant child, as the executor could not, of course, sell the property of an adult (unless absent, *vide infra*, 277).

which they are intended to be used; for it is clear that all the inheritors' portions, including that of the infant, are to abate rateably, as it is added that "the distribution of inheritance, as at first executed, is annulled, the case being, in fact, the same as if no such slave had ever existed, or been accounted upon as part of the estate." Generally, if the executor sell part of the testator's estate on account of any infant inheritor, and the property sold prove to belong to another, the executor is liable to the purchaser, the inheritor to the executor, and, it may be presumed, the other inheritors (as in the case immediately preceding) to the particular inheritor in question. If, on the other hand, the Kazee's ameen (or, presumably, the Kazee himself) sell anything which proves to be the property of another than the deceased, in the case either of an adult or of an infant inheritor, the purchaser* will get his compensation directly from such inheritor if adult; and the Kazee, if the inheritor be an infant, must appoint a person for the discharge of the debt from his property.†

When an executor gives a bill of sale, he "must not insert his power as an executor in it, but must give a separate paper to that effect, out of caution"; for otherwise "the witness to the sale might set his name to the bottom of the instrument without examination, which would implicate a false testimony, since with the ex-

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* "Proprietor" in the Hedaya, but this is evidently a misprint.
† Hed. xx. iv. 13; lii. vii. 26.

ecutorship he has no concern." * The meaning of this is, apparently, that the witness might, by placing his signature, accidentally, in a wrong place, appear to bear testimony to the fact of the vendor being executor, instead of merely being a witness to the act of selling. Some would push the caution so far as to maintain that the attestation should be in the form "Sold by Zeyd the son of Omar," or the like, and not "Sold by Zeyd the executor of," &c.†; but this view does not appear to be supported by any satisfactory authority.

In connection with the powers and duties of an executor with respect to infant and absent heirs, there are a few special points that may be mentioned.

An executor who is the guardian of an orphan may assent to a transfer of a debt due to his ward by the debtor to another person, if it be to the interest of the ward, but not otherwise; and it is held to be to his interest if the transferee is richer than the transferor, and is a man of property, but not if the transferor is richer than the transferee, for the power of acting is vested in the executor merely that he may employ it for the orphan's interest.‡

An executor may not trade with the property of an orphan under his charge, for it is committed to him for preservation, not for purposes of trade; he may, however, buy or sell moveables on account of such

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* Hed. lii. vii. 28. † *Ibid.*

‡ Hed. lii. vii. 27.

orphan, either for an equivalent or at such a rate as to occasion only an inconsiderable loss, but not so as to produce a great loss.* In like manner, an executor may sell moveable property of an absent adult son of the testator,† for the father might do so if alive, and the executor represents the father. He may also sell such absent son's immoveable property if it will otherwise perish or be lost, but not otherwise, for such property, in its own nature, is in a state of conservation, whereas moveable property is, in a manner, conserved by the conversion into money.‡ According to Abu Yusuf and Muhammed, an executor has the like powers as to sale of the moveable property of an infant or absent brother or nephew (which here means, no doubt, brother's son); and according to the same authorities, an executor appointed by a woman has the same powers with respect to her infant or absent son.§

It would seem that, generally, an executor's duties are at an end after the division between the two participating groups (viz. the legatees and the inheritors) has been made,‖ and sometimes even before; for the inheritors, if none of them are infants or absent, take their own portion of the property, and the legatees, if none are

* Hed. lii. vii. 28, 30. There can be no doubt, from the context, &c., that the "orphan under his charge" means an infant inheritor who is the ward of the executor.

† "Absent adult heir" in the Hedaya, but the context seems to show that a son of the testator is meant.

‡ Hed. lii. vii. 29.

§ Hed. lii. vii. 31.

‖ *Vide supra*, 270.

infants or absent, take theirs; while, even if any of the latter are infants or absent, the executor, as we have seen, has no right to take possession of their portion.* Such portion, it would seem, goes into the custody of the inheritors, who are no doubt responsible for it, and hold it on a kind of trust, so long as it remains in their possession.† But in the case of absentees, they may relieve themselves from this responsibility by availing themselves of the powers of the Kazee, who is bound to preserve the legacy if delivered to him. Thus, if a man bequeath a third part of a thousand dirms to an absentee, the heirs may consign the whole sum to the Kazee, who, after making the proper division of the sum, must set apart the portion of the legatee and take possession of it on his behalf; and if the money be lost in the Kazee's possession, the legatee will have no claim upon the inheritors. When a legacy has been thus set apart, if the legatee die without declaring his acceptance, the legacy will go to the persons entitled to inherit from him.‡ And it is clear, also, that the inheritors

* Hed. lii. vii. 18, 19; and *vide supra*, 271.

† Hed. lii. vii. 21. *Vide* also Hed. xxvi. iii. "Section" (second). 3, where inheritors into whose hands the estate has come are described as holding it on a trust. And at Hed. lii. ii. 13, the "heirs" are mentioned as the proper persons to get in outstanding debts, and to pay sums, from time to time, as they come in, to a pecuniary legatee.

‡ Hed. lii. vii. 21. It will be remembered that acceptance is generally necessary to the completion of a legacy; but that, if a legatee die without express acceptance or refusal, acceptance is held to be implied, *vide supra*, 233.

may have to perform duties which might be expected to fall on the executors; thus we find that if a man dies, having directed by will that a pilgrimage which was incumbent on him shall be performed after his death, the inheritors appear, primarily, to be the persons whose duty it will be to cause such pilgrimage to be performed.*

It has been seen above that an executor may be appointed either for a particular purpose (*e.g.* the payment of a single legacy) or for the general carrying out of the testator's will.† In the rules laid down respecting the duties and liabilities of executors, there is no distinction drawn between those of the former kind of executor and those of the latter. It may therefore be reasonably assumed that there is no difference in principle between these two species of executors, and that an executor of the former kind has the same rights, immunities, and responsibilities as one of the latter, so far as they are applicable to the more limited nature of the property entrusted to his care and the duties which he is to perform.‡

The maxims given above as to the duties, powers, and

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* Hed. lii. iii. "Section". 4.

† *Vide supra*, 261.

‡ Some extracts from the Fatáwa Alamgíri on this subject will be found at Tag. Lect., 1874, 96, &c.; and numerous extracts, from that and other native treatises, on the powers and responsibilities of executors generally, will be found at Tag. Lect., 1874, 100, &c. *Vide* also Bail. Dig., Chap. VIII., where a good deal of detailed information about executors is given, but, unfortunately, without systematic reference to authorities.

responsibilities of executors are more widely instructive than they may seem to be at first sight. It has been seen that in most instances there are reasons stated with much minuteness, and, by a careful comparison of the cause and its effect, a general principle may often be evolved from what is ostensibly given as an isolated conclusion on a particular set of facts. In order that the reader may have the full benefit of this method, we have endeavoured to give a strictly accurate record of facts and reasons as we actually find them, conscious that if we were to translate them, as it were, into broader statements, we should substitute our own opinions for the ascertained law recorded by the Arabian authorities, and should, notwithstanding every effort to the contrary, give sometimes more and sometimes less than has actually been laid down. In some instances, where a broader conclusion than that given by our authorities seemed obvious, or, at least, very reasonable, we have felt that it was not beyond our function to suggest it; but in such cases we have been careful to distinguish between our own surmises and the ascertained legal dogmas, so that we may reasonably hope that our readers will never mistake the one for the other.

Dispositions by Sick (Dying) Persons.—There are several methods of disposition, which, when employed by sick (*i.e.* dying) persons,* are more or less analogous

* The expression "sick person," for the purpose of the subject here introduced, means a person on his death-bed, and is

to bequests, and which may materially affect the rights and interests of inheritors; these are, a gift, a manumission or direction for manumission, an act of mohabat, and an acknowledgment of debt. It seems desirable, in a treatise on inheritance, to give some account of these modes of disposition; and their partial resemblance to bequests makes it convenient to deal with them in this place.

The words "gift, manumission,* and acknowledgment of debt," require no definition. An act of mohabat is any act by which a person gives more or takes less for anything than its real value, and connives at the loss. The word applies, however, not only to actual purchase or sale of material articles, but to dower, hire, security, or the like; so that, *e.g.* if a man pay to his wife as

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used here, as in the old Arabian treatises, for the sake of brevity. This will be alluded to more in detail, *infra*, 289; but it may be as well to mention here that, under ordinary circumstances, a man may make a valid gift or voluntary disposition "of immediate operation" as to the whole of his property, but that, if he make a gift or voluntary disposition "restricted to the circumstance of his decease," it takes effect, generally, only to the extent of a third of his property, whether he be in sickness or in health. *Vide* Hed. lii. ii. "Section". 1.

* The translator of the Hedaya uses the word "emancipation" in this and many other places. We think it best, however, to adhere to the use of the word "manumission," so often employed in previous parts of this work, both for consistency, and because many of our readers have probably been accustomed, in dealing with Roman law, to look upon the word "emancipation" as more especially appropriated to another sense, namely, that of a release from parental control.

dower more than she is entitled to, or give to a hired person more than he has agreed to take, it is an act of mohabat.*

A gift by a sick person, a manumission or direction for manumission by such a person, and an act of mohabat by such a person, stand on the same footing with a bequest in this respect, that they can take effect only to the extent of a third of the property. But the two latter kinds of disposition, as distinguished from the former, differ from a bequest, in that, instead of abating with it if a third of the property be insufficient, they take precedence of it.†

On the other hand, an acknowledgment of debt by a sick person, which creates the kind of debt called a "debt of sickness," is not limited to a third, but may extend, equally with a debt of health, to the whole of the property. An acknowledgment of debt is not, like a gift, held to be a gratuitous act, and therefore a debt of sickness is deemed to be an actual debt, though it is not to be paid until the debts of health are satisfied. It necessarily takes precedence, however, of legacies and claims of inheritance, and it will therefore, if large enough to exhaust the whole property, oust the rights of legatees and inheritors entirely.‡ It further differs

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* Hed. lii. iii. 1 (and note. *ibid.*).

† Hed. lii. ii. "Section". 1; lii. iii. 1, 3.

‡ Sir 1, 2; Shar. 56; Hed. xxv. iii. 4, 5, 8; lii. ii. "Section". 1. It may be as well to mention at once that an acknowledgment of debt may also be made in health; in which case the debt created is a debt of health, and takes precedence of debts of sickness.

from a legacy in taking effect immediately, and not merely after death.*

Several manumissions, or several acts of mohabat, if amounting together to more than a third of the property, abate together like legacies; but if manumission and mohabat come into competition, according to Abu Yusuf and Muhammed, manumission takes precedence; but according to Abu Hanifa, mohabat takes precedence if earlier in date, and they abate together if the manumission be earlier in date.†

Thus, if a sick man, by mohabat, direct that a slave worth 30 dirms be sold to A. for 10, and a slave worth 60 dirms to B. for 20, and die leaving no other property, as 10 dirms and 20 dirms together form a third of the estate, the purchasers can claim no more, but must pay the rest of the value of the slaves if they desire to possess the slaves entirely. Similarly, if a sick man manumit two slaves worth 30 and 60 dirms respectively, and leave no other property, the slaves will be free respectively to the extent of 10 and 20 dirms, and will have to work out the other two-thirds of their freedom by emancipatory labour.‡

Vide Hed. lii. ii. "Section". 1. See further as to the distinctions between debts of health and debts of sickness, *supra*, 191, &c.

* Hed. xxv. iii. 8; lii. i. 8. As to the singular reasoning, founded on this circumstance, respecting the extent of its operation, *vide infra*, 291, note.

† Hed. lii. ii. 3; lii. iii. 2.

‡ Hed. lii. ii. 3. In this and all similar cases it is assumed, of course, that the inheritors refuse to ratify the transaction, and insist on having their two-thirds.

On the other hand, if a sick man manumit a slave worth 100 dirms and sell by mohabat for 100 dirms another slave worth 200, and die leaving no other property, according to Abu Yusuf and Muhammed the first-mentioned slave will be entirely free, and the sale by mohabat will have no effect; but according to Abu Hanifa, if the sale by mohabat come first in order of date, it will be carried out in its entirety, and the first-mentioned slave will receive no benefit; while, if the manumission come first, the slave will be manumitted to the extent of 50 dirms, and the claimant by mohabat will be credited with 50. Similarly, if a sick man who has three slaves of equal value* as his only property, first sell one by mohabat, then manumit another, and then sell a third by mohabat, according to Abu Yusuf and Muhammed the second will be entirely free, and the claims by mohabat will be reduced to nothing; but according to Abu Hanifa, half of a third part of the property is applied for the purposes of the first mohabat, and the other half, in equal portions, for those of the manumission and the second mohabat. And if there be first a manumission, then a mohabat, and then another manumission, according to Abu Yusuf and Muhammed the two manumitted slaves will divide the benefit equally, and the claimant by mohabat will take nothing; while according to Abu Hanifa, the two manumitted

* The words "of equal value" are implied in the question and its solution, though not actually used.

slaves will divide one-half of the benefit equally, and the claimant by mohabat will take the other half.*

Generally, if a sick person purport to manumit a slave worth more than a third of his property, the manumission, though, as above mentioned, primarily effectual only to the extent of a third, will be effectual to the full value of the slave, if the persons entitled by inheritance consent; as, for instance, if a sick person whose whole property is worth only 200 dirms purport to manumit a slave worth 100 dirms, and his two sons, being the only heirs, consent. If the consent be not given, the slave will, of course, be deemed free only to the extent of a third of 200 dirms, and will have to work out the rest of his ransom by emancipatory service.† If, however, a sick moostamin purport to manumit his slave or to make him a modabhir, the act holds good even if the value of the slave be more than a third; for, as explained in an earlier passage, a moostamin's relations have no cognizable rights of inheritance.‡ It may fairly be assumed, on principle, that the same doctrines are applicable to gifts and acts of mohabat.

Gifts and acknowledgments of debt (and, it may be presumed, also manumissions and acts of mohabat) by a sick person in favour of a person entitled by inheritance, are void, equally with bequests in favour of such a person, unless the other inheritors give their consent.

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* Hed. lii. iii. 2.

† Hed. lii. iii. 5.

‡ Hed. lii. vi. 8, and *vide supra*, 224.

But, in considering who are to be deemed inheritors for the purposes of this rule, regard must be had, in the case of an acknowledgment, to the time of making such acknowledgment; while in the case of a gift, regard must be had, as in the case of a bequest, to the time of the testator's death.*

Thus, if a sick person make an acknowledgment of debt in favour of a woman who is his wife at the time, it is invalid; if, on the other hand, she is not his wife at the time, it is valid, even though she afterwards become his wife.† And if an acknowledgee have in him the cause of inheritance, *i.e.* relationship or marriage, at the time of the acknowledgment, he will be deemed to be an inheritor for the purpose of the invalidity of the acknowledgment, even though barred by a disability such as slavery or infidelity; for the fact of his being related to or joined in marriage with the sick person creates a suspicion that the acknowledgment is false, and has merely been made in order to secure part of the property to the acknowledgee. On this principle it is laid down that a wife or son who is a Christian, an absolute slave, or a mokatib, at the time of the acknowledgment, will not take anything by it, even though the disability be removed, before the sick person's death, by conversion or manumission, as the case may be.‡ It is true that

* Hed. xxv. iii. 6; lii. i. 8; lii. ii. "Section". 2.

† Hed. xxv. iii. 9; lii. ii. "Section". 2, 3.

‡ Hed. lii. ii. "Section." 3, 4. It will be observed that the case of a woman who becomes a wife after the acknowledgment is different, for she has not in her the cause of inheritance at the time of the acknowledgment.

the doctrine, so far as regards a slave, is disputed, but only on a ground which does not seem to touch the general argument.*

On the other hand, a gift by a sick person to one who is not his wife at the time is primarily valid, but becomes invalid if she afterwards become his wife and be so at the time of his death.† Similarly, a gift by a sick man to his son, who is a Christian, an absolute slave, or a mokatib, at the time of such gift, is void, if the son become a Moohummudan, or a free man, as the case may be, before the death of the father.‡

If a sick man make an acknowledgment of debt in favour of a stranger, and afterwards declare that "he is his son," the parentage is established from the time of the stranger's birth, and the acknowledgment is void.§

If a sick man divorce his wife by three divorces, and then make an acknowledgment of debt in her favour, and die before the expiration of her edit, she will take the amount which would come to her as an heir, or that which would come by the acknowledgment, whichever is

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* This ground is, that the acknowledgment takes effect virtually in favour of the slave's master, who is not an inheritor, and that its validity, having thus been once established, is not disturbed by the actual acknowledgee becoming an inheritor afterwards.—*Ibid.* and Hed. lii. i. 8.

† Hed. lii. ii. "Section". 2.

‡ Hed. lii. ii. "Section". 3, 4.

§ Hed. xxv. iii. 9. As to acknowledgments of parentage, generally, *vide* Hed. xxv. iii. "Section". 1, &c.

the smaller; for thus, if there have been collusion, she will not profit by it.*

An acknowledgment of debt by a sick person in favour, jointly, of an inheritor and another person, is invalid with respect to both, thus differing, again, from a bequest, which, under similar circumstances, would only fail as to the inheritor's portion.†

Although, as above mentioned, an acknowledgment of debt by a sick person is valid, generally, even if made to the extent of the whole property, yet, if it is made in an indefinite manner, as if a man say to his inheritors, "I am indebted to A., and you must credit what he says," or, "If A. come to you and claim anything from you on my behalf, pay him the same, to whatever amount," it takes effect, if there are no actual legacies, only to the extent of a third of the property; and it is ineffectual if there are legacies,‡ unless the legatees and inheritors

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* Hed. xxxv. iii. 10.

† Hed. lii. ii. 25, and *vide supra*, 231. As regards the general question of acknowledgment in favour of an inheritor, the reader must be cautioned against a statement of Mr. Macnaghten, that "an acknowledgment of debt in favour of an heir, on a death-bed, resembles a legacy, inasmuch as it does not avail for more than a third of the estate." This passage is calculated to cause much misapprehension, and it is the more likely to be dangerous from the circumstance of its having been, unfortunately, adopted by Shama Churun Sircar.—*Vide* Tag. Lect., 1874, 86, note.

‡ That is, if the legacies amount to a third or more, as "one-third of his estate must be set apart for the legatees and two-thirds for the inheritors." It must be presumed, however, that if the legacies amount to less than a third, the acknowledgment will be valid to the extent of the remaining part of the third.

consent. If, however, both these classes consent, the debt must be paid as follows:—one-third from the portion set apart from the former and two-thirds from that set apart from the latter.*

An acknowledgment of debt by a sick person having for its subject matter a specific article† is invalid; for such an acknowledgment may cause injury to the creditors, *i.e.* to the persons claiming in respect of debts of health, which, as above explained, take precedence of debts of sickness.‡

The word "sick," when used with reference to the above subjects of gift, manumission, mohabat, and acknowledgment of debt, is equivalent, as mentioned earlier,§ to "dying," and certain practical rules are laid down for the purpose of determining whether the sickness is really such as to reduce these acts from acts of health to acts by dying persons. The Arabic word for "sick," in this sense, is *mareez*. Paralytic, gouty, and consumptive, persons who have lingered as long as a year, and are in no immediate danger of death, are considered not to be

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* Hed. lii. ii. 23. The reader must be on his guard against the marginal note in the Hedaya, which states the effect of the paragraph incorrectly.

† The exact words are, "something he holds in his hand," but the reason given seems to leave no doubt as to the meaning.

‡ Hed. xxv. iii. 2. The meaning of this would seem to be that, as the creditors have a superior right which pervades every part of the property, the setting apart of a particular object for the acknowledgee would be, *pro tanto*, an infringement of that right.

§ *Vide supra*, 280, 281, note.

mareez, "because, when a long time has elapsed, the patient has become familiarized with his disease, which is not then accounted as sickness." But if, after a year, the invalid become bedridden, he is then, again, accounted to be *mareez*. Consequently, if any sick persons thus described make a gift after the expiration of a year, and before they are bedridden, it may extend to the whole of their property; but if they make a gift "at the beginning of their illness, or after they have become bedridden," it is then a dying gift, and can only extend to a third, "because at such a time there is apprehension of death (whence medicine is then administered to them), and therefore the disorder is then considered as a death-bed illness."* Finally, it is said that "a sickness of which a person afterwards recovers is considered, in law, as health."†

We have thought it right to treat an acknowledgment of debt by a sick person as a "disposition," for, although there are indications of its being considered, at least theoretically, as an acknowledgment of an actual debt previously incurred,‡ yet there is no doubt that it takes effect without any such debt being known to exist. It is, indeed, laid down that "if the cause of the obligation is known"; that is, if the debt is supported by

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* Hed. lii. ii. "Section". 5.

† Hed. lii. ii. "Section". 1. A note to this paragraph states that the words occur in the Persian translation, not in the original Arabic.

‡ *Vide supra*, 286.

anything beyond the mere acknowledgment, the debt is a debt of health, and not a debt of sickness; whence it appears that it is of the very essence of a debt of sickness that a genuine transaction, such as the purchase of a house, or the like, from which it arose, should not be known to exist.* Consequently, the doctrine of acknowledgment of debt is practically a power of disposition (whether it gives, theoretically, a *right* of disposition or not); and it cannot be reasonably assumed that sick persons invariably refrain from exercising it as such, when it is considered that motives of friendship to a stranger, or of dislike for relations, must frequently suggest such a course.†

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* Hed. xxv. iii. 1.

† The Arabian writers have themselves felt the difficulty of allowing the inheritors to be deliberately deprived of their rights; and some of them, dissatisfied, apparently, with the technical reason that debts precede inheritance, have suggested the singular argument that, as the acknowledgment takes immediate effect, the sick person, having made an acknowledgment as to one-third, has it at once in his power to make a further acknowledgment as to a third of the remaining two-thirds (as they now constitute the whole of his property), and to continue this process until nothing (or, as it would be more correct to say, until only an infinitesimal fraction) remains. *Vide* Hed. xxv. iii. 8.

CHAPTER XVI.

OF MARRIAGE.

Preliminary, 292.—Prohibited Degrees, 293.—Prohibitions for Fosterage, 295.—Relative Prohibitions, 296.—Rules of Equality, 298.—Miscellaneous Prohibitions, 304.—Marriages not Prohibited, 307.—The Marriage Contract, 310.—Contract by Guardian: Adult Female, 315.—Contract by Guardian: Infant, 319.—Reciprocal Contract by Guardians, 323.—Guardians bound by Rules of Equality, 324.—Contract by Agent, 324.—Marriage of Slaves, 329.—Infidels; Aliens; Captives, 335.

PRELIMINARY.—The Arabian word *nikkah*, which is usually translated "marriage," originally means the act of sexual intercourse; but, as a legal term, it implies "a particular contract for the purpose of legalising generation." *

* Hed. ii., Preliminary Definition.

Marriage is, generally, an essential preliminary to the accrual of a right of inheritance, since inheritance—except in rare cases, such as inheritance "for special cause," and the like—accrues either by actual marriage with the deceased, or by relationship, which is a result of marriage. Moreover, a woman's right to dower, which is an incident of marriage, may seriously affect the interests of the relations, and may even deprive them of their inheritance altogether.* It will, therefore, not be unprofitable, in a treatise on Moohummudan inheritance, to set forth briefly the conditions under which marriage is lawful and effectual according to Moohummudan law.

As marriage is a general right of mankind, and may be assumed to be allowable except when forbidden by law, it will be more convenient to define unlawful, than to define lawful, marriages. We shall therefore adopt this course, and we shall begin by enumerating what would be called in England the "prohibited degrees," in other words, the degrees of relationship or connection by marriage which render the marriage of a man with a particular woman unlawful.

PROHIBITED DEGREES.—It is unlawful, then, for a man to marry his†—

Mother.
Father's mother.‡
Mother's mother.‡

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* *Vide infra*, Chap. xvii.

† This list is collected from Hed. ii. i. "Section". 1–7.

‡ Probably also remoter female ancestors on either side, the word "grandmother" being used.

Daughter and all other direct descendants.
Sister (and, presumably, C. sister and U. sister*).
Brother's, C. brother's, and U. brother's, daughter.
Sister's, C. sister's, and U. sister's, daughter.
Pat. aunt (and, presumably, C. and U. pat. aunt).
Mat. aunt (and, presumably, &c.).
Father's pat. aunt (and, presumably, &c.).
Father's mat. aunt (and, presumably, &c.).
Mother's pat. aunt (and, presumably, &c.).
Mother's mat. aunt (and, presumably, &c.).
Similar relations (*i.e.* aunts) at higher stages, (and, presumably, &c.).
Wife's mother (whether the marriage with that wife have been consummated or not).
Wife's daughter (if the marriage with that wife have been consummated).

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* In the same passage, marriage with brothers' and sisters' daughters is forbidden, and it is afterwards explained that this prohibition includes the daughters of C. and U. brothers and sisters; consequently it may be assumed, *à fortiori*, that the prohibition of a sister includes C. sisters and U. sisters. It may further be observed that the word indicating any particular relation (as brother, uncle, aunt, &c.) is generally used by the Moohummudan writers as including the corresponding C. and U. relations also. Between a man and the U. sister of his C. brother there is no prohibition. Hed. iii. i. 6.

Father's wife.
Father's father's wife.*
Mother's father's wife.*
Son's wife.
Son's son's wife.
Daughter's son's wife.

PROHIBITIONS FOR FOSTERAGE.—It is stated, generally, that whatever is prohibited in consanguinty is prohibited in fosterage, but it is expressly laid down that a man *may* marry his sister's foster mother, his foster sister's mother, his foster sister's foster mother, or his foster son's sister, whereas he may not marry his sister's mother (for she would be his father's wife), nor his son's sister (for she would be his wife's daughter, and would therefore be forbidden to him except in the absence of consummation, which absence cannot exist here†). It is also laid down that a man may marry the sister of his foster brother.‡ It is, apparently, allowed that the general rule holds good with these exceptions (if they

* Probably also the wives of remoter ancestors on either side, the words being "the wife of his grandfather," supported by a command of GOD, "Marry not the wives of your progenitors." Hed. ii. i. "Section". 6.

† Hed. ii. i. "Section". 8; iii. i. 5. The word "sister" in this portion of our text, cannot be limited, as elsewhere, to the meaning of "sister of the whole blood."

‡ Hed. iii. i. 6.

may be called exceptions), but the following prohibitions are stated in express terms*:—

Foster mother.
Foster sister.
Foster father's wife.
Foster son's wife.
Foster mother's husband's sister.
Father's foster sister.

A number of minute rules will be found in the Hedaya as to what amounts to fosterage and the like; and it is laid down that the evidence necessary to establish fosterage is that of two men, or of one man and two women.† It does not seem necessary to enter into further particulars on this subject, but the reader is referred to the portion of the Hedaya which treats of it.‡

Relative Prohibitions.—Besides the above simple prohibitions, there are several rules of relative prohibition laid down, whereby a man is forbidden to marry a woman by reason of her relationship to a person to whom he is already married. These rules will be next mentioned.§

A man may not be married to and cohabit with (at

* Hed. ii. i. "Section". 8; iii. i. 5, 6.

† Hed. iii. i. 13.

‡ Hed. ii. i. "Section"; and iii. i. *passim.*

§ The author has not seen the term "relative prohibitions" used elsewhere, but it is submitted that it fairly describes the class of prohibitions to which it is here applied.

the same time) two women who are sisters, nor may he cohabit with two sisters in right of possession (*i.e.* two sisters who are his slaves*). But he may marry the sister of his female slave with whom he has not cohabited. After this, however, he must not have carnal connection with that female slave, even though he should never consummate his marriage with her sister; nor must he have carnal connection with the latter until he has rendered the female slave unlawful to him and relinquished his right of cohabitation with her by some means or other, such as emancipating her, or marrying her to another man.† If a man marry a sister of his repudiated wife, before the expiration of the edit of the latter (whether the divorce be complete or reversible), such marriage is unlawful, for it amounts to a marriage with two sisters at one time.‡ If a man should happen to marry two sisters by two contracts, and it is not known to which of them he was first married, a separation from both must ensue.§

A man may not marry two women of whom one is aunt or niece of the other.‖

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* Hed. ii. i. "Section". 9.

† Hed. ii. i. "Section". 10. This cannot be clearly understood unless it is remembered that, primarily, any man has a general right to have sexual intercourse with his own female slave.

‡ Hed ii. i. "Section". 16.

§ Hed. ii. i. "Section". 11. It will be seen, *infra*, 324, that a man may sometimes be married by a contract made by an agent, from which it follows that he may, unexpectedly, find himself married to two sisters. As to dower in such a case, *infra*, Chap. xvii.

‖ Hed. ii. i. "Section". 12.

A man may not marry two women so related to one another that, supposing each, in turn, to be a man, a marriage between such a man and the other woman would be illegal. But it is said that there is no prohibition where a marriage would be lawful on one of the two suppositions, though unlawful on the other; thus there is no prohibition with respect to a woman and her step-daughter; for though, if the step-daughter were a man, such a man could not marry the other woman (she being his father's wife), yet, if the step-mother were a man, such a man, it is said, might lawfully marry the other woman. This reason, however, would seem to be somewhat questionable; and a better reason is given, viz. that there is here "no affinity, either by blood or fosterage." *

Rules of Equality.—In connection with the rules of prohibition arising from relationship and similar causes, it may be desirable to mention the rules of what is technically called "equality" in marriage. It is laid down that regard is to be had in marriage to equality (*kafat*) between the husband and wife; but this is interpreted to mean that the husband must not be inferior to the wife, and there is no objection to the converse kind of inequality, for it is considered that a woman of high rank and family would abhor society and cohabitation with a mean man, but that a man, on the other hand, is

* Hed. ii. i. "Section". 13, 14. As to the marriage of a step-father with a step-daughter, which is, it would seem, not always lawful, *vide supra*, 294.

not degraded by cohabitation with a woman who is his inferior. If a woman contract an unequal marriage, her guardians have a right to separate the husband and wife, so as to remove the dishonour that they might otherwise sustain by it.* It may probably be assumed from the way in which this doctrine is stated, that there is no absolute prohibition for inequality, and that, subject to its being thus voidable by the guardians, an unequal marriage may be considered valid.

The points in which equality in marriage should exist are tribe or family, religion, freedom, character, fortune, and trade or profession.† Such, at least, is the general rule laid down; but it can only be accepted subject to the following explanations; and it may be added that some of the rules are so vague, and the opinions relating to them so conflicting, that it seems impossible that they can be carried out *in toto*, though, as they involve some important considerations and matters of principle, we have thought it undesirable to omit to enumerate them.

As to tribe or family, any two persons belonging to the Kooraish tribes‡ are considered equal (though they may not be of the same tribe), with this exception, stated by Muhammed (and apparently admitted), that a pre-eminence exists "where the same is notorious," as in the case of the House of the Khalifs. Again: Arabs generally, that

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* Hed. ii. ii. "Section" (first). 1, 2; *vide* also ii. ii. 2.

† Hed. ii. ii. "Section" (first). 3–8.

‡ The descendants of Nazir, or of Kihr, according to different authorities, *ibid.*

is, those who derive their descent from a stock anterior to that of the Kooraishees, are considered equal among themselves (but, presumably, inferior to the Kooraishees), with the exception of the Binno Bahala tribe, which, being notorious throughout Arabia for every kind of vice, is considered inferior to all other Arab tribes.*

With regard to religion, it may probably be assumed that any man who is not a Mussulman is considered inferior to a woman who is a Mussulman.† Mawalees, that is to say Ajims, who are neither Kooraishees nor Arabs, are considered, generally, to be equals to one another, as being all Mussulmans. And an Ajim whose family have been Mussulmans for two or more generations is equal to one descended (presumably entirely) from Mussulmans. But an Ajim who is the first Mussulman of his family is inferior to a woman whose father is a Mussulman; and an Ajim who is himself, or whose father is, the first Mussulman of his family, is, according to Abu Hanifa and Muhammed, inferior to a woman whose father and grandfather are Mussulmans. Abu Yusuf dissents partly from this doctrine, maintaining that an Ajim whose father is a Mussulman is the equal of a woman whose father and grandfather are Mussulmans.‡

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* Hed. ii. ii. "Section" (first). 3.

† This seems to result, by *à fortiori* reasoning, from what follows.

‡ Hed. ii. ii. "Section" (first). 4. It may, no doubt, be assumed that by grandfather is here meant "father's father." An Ajim, or Ajmee, is a Persian; or, in a wider sense, a native of any country other than Arabia.—Hed. xxxiii. 10, note.

As to freedom, it seems clear that a male slave is inferior to a free woman. And, with respect to persons who are free, but who have been slaves or who are descendants of slaves, the rules are stated to be the same in all particulars as those above given relating to religion.* But it is clear that there is no absolute rule interdicting the marriage of a free woman with a slave, for, in a later passage of the Hedaya, we find such a marriage alluded to as valid.†

With regard to character, the rule is, perhaps necessarily, rather vague. The author of the Hedaya, following Abu Hanifa and Abu Yusuf, considers that there must be equality in piety and virtue, as a woman suffers scandal and shame from the profligacy of her husband. Muhammed is of opinion that positive equality in such matters is a question of religion, to which rules regarding mere worldly matters do not apply. He allows, however, that the want of equality may be established by base or degrading misconduct, such as appearing naked or intoxicated in the public streets, by which a man may have incurred derision and contempt.‡ There would seem to be little or no practical difference between these opinions, which may perhaps be summed up thus: that minute comparison in such matters is impracticable, but that gross and notorious impropriety of conduct is

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* Hed. ii. ii. "Section" (first). 5.

† Hed. ii. iv. 18; and *infra*, 334; *vide* also *infra*, 303, 331.

‡ Hed. ii. ii. "Section" (first). 6.

a sufficient ground for holding the bar of inequality to exist.

As to fortune, it is required that the man should have enough for maintenance and for discharge of that portion of the dower called *moajil*, or prompt, which it is customary to give immediately on the marriage. Abu Hanifa and Muhammed hold that even this is not sufficient if the woman is possessed of large property, but that the man's fortune should be "considered in general (without regard to any particular ability"). Abu Yusuf, however, considers even less than this sufficient, maintaining that the husband need only have enough to maintain his wife, without any regard to payment of dower. It is doubtful what is to be considered a sufficiency for maintenance, some holding that the ability to support the wife for a month is enough, while others maintain that there should be ability to support her for a year.*

The opinions as to trade or profession are conflicting, and the authors of the Hedaya seem to feel some doubt whether the rule of equality is to be observed in this respect. It is, therefore, unnecessary to say more on the subject here; but the reader will find the opinions, such as they are, in the paragraph relating to this subject in the Hedaya, from which it would appear, among other things, that barbers, weavers, tanners and other

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* Hed. ii. ii. "Section" (first). 7. As to dower, generally, *vide infra*, Chap. XVII.

workers in leather, and scavengers, are considered inferior in the social scale to merchants, perfumers, druggists, and bankers.*

The following doubtful points, more or less connected with the rules of equality, are worthy of notice:—

As to freedom, Abu Hanifa and the "two Elders" maintain that if a father contracts his infant child (whether male or female) to a slave, it is lawful, unless it can be shown that the father, who may naturally be supposed to have been seeking in some way the advantage of his child, has, in fact, had no particular advantage in view, but in such case the contract is null. Abu Yusuf and Muhammed consider it to be illegal under any circumstances.†

As to fortune, if a woman contract herself in marriage, consenting to receive a dower of much smaller value than her "proper" dower, Abu Hanifa is of opinion that the guardians may oppose the marriage until the husband shall agree to the payment of a complete "proper" dower, or to a separation. Abu Yusuf

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* Hed. ii. ii. "Section" (first). 8. The circumstance that particular trades and occupations are handed down from generation to generation in the East more persistently than in our own country, may account, in a great measure, for the more marked distinctions which appear, in regard to social status, between persons devoted to the various kinds of commercial pursuits.

† Hed. ii. ii. "Section" (first). 11. It must be observed that the instance of an infant *son* is not a question of equality, as that doctrine relates to inferiority, not superiority, of the male; *vide supra*, 298, 299.

and Muhammed take the opposite view.* Again: if a father or grandfather contract an infant female, agreeing to a very inadequate dower, or contract an infant male, agreeing for a very extravagant dower, Abu Hanifa considers such contract lawful, but Abu Yusuf and Muhammed, though admitting, apparently, this right in a moderate degree, consider the contract illegal if the inadequacy or extravagance (as the case may be) is so great as to be "very apparent." All are agreed that it would be unlawful if any but the father or grandfather made the contract.†

MISCELLANEOUS PROHIBITIONS.—Besides the above-mentioned prohibitions, there are some others depending on particular circumstances of a miscellaneous character.

Thus, adultery, fornication, and some other kinds of indecent acts with a woman, make it unlawful for the man who commits them to marry that woman's mother or daughter.‡

A man may not marry his own female slave, nor may a woman marry her male slave, because marriage was instituted with a view that the fruit might belong equally to the father and the mother; and therefore it is not right that offspring should thus be divided between the

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* Hed. ii. ii. "Section" (first). 9. As to guardians, *vide infra*, 315, &c.; 319, &c.

† Hed. ii. ii. "Section" (first). 10. As to the rights of the father and grandfather as guardians, *vide infra*, 319.

‡ Hed. ii. i. "Section". 15, where the reader will find the subject treated in greater detail.

master and the slave.* And a man already married to a free woman may not even marry the female slave of another person.† If the last kind of marriage take place during the edit of complete divorce of the free wife, it is void according to Abu Hanifa; but according to Abu Yusuf and Muhammed it is valid.‡

A Mussulman may not marry a majoosee woman or a pagan woman, nor may he marry a sabean woman if she worships the stars and does not believe in any of the divine scriptural revelations, for such a sabean is considered to be an idolater.§

A man may not marry a woman taken in war, being pregnant at the time of her capture, "because the parentage of her fœtus is ascertained"‖; and he may not marry a woman pregnant by whoredom, "if the descent of the fœtus be known and established."¶

An usufructuary marriage, *i.e.* where a man says to a woman, "I will take the use of you for such a time for so much," is void; so also is a temporary marriage

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* Hed. ii. i. "Section". 17.

† Hed. ii. i. "Section". 24; ii. vi. 3. As to marriage with a free woman when already married to a slave, *vide infra*, 308.

‡ Hed. ii. i. "Section". 25.

§ Hed. ii. i. "Section". 19–21. A majoosee, or majoos, is a parsee, or fire-worshipper, Wils. Gloss.; a pagan, a polytheist, Hed. *ibid*; as to sabeans (or sabians), *vide* Encyclopædia Metropolitana, title "Sabæans."

‖ Hed. ii. i. "Section". 30. A note in the Hedaya gives as a reason, that the fœtus must proceed from some of the enemy; but no authority is given.

¶ Hed. ii. i. "Section". 29.

(*e.g.* a marriage for 10 days) whether for a short or for a long time, for such a marriage is of the same nature with an usufructuary marriage.*

A marriage with the am walid of another man, when the am walid is pregnant by such other man, is void, and therefore if a man contract his pregnant am walid to another man, such contract is void, because the parentage is established in the owner.†

A free man may not have more than four wives at the same time, whether free or slaves. If a free man, having four wives, repudiate one of them, it is unlawful for him to marry any other woman during that wife's edit, whether the divorce be complete or reversible. A slave may not have more than two wives.‡

It would seem that it is the duty of the Kazee to separate persons who are joined by a prohibited marriage, for the Hedaya alludes to his performing such a duty. And, although such a marriage is frequently alluded to as being "null," so as to induce a conjecture that it is, generally, in the language of English law, not merely voidable but actually void, it is nevertheless certain that it is not entirely without effect during its continuance. Thus we shall see hereafter that, under certain circumstances, a woman whose marriage is invalid

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* Hed. ii. i. "Section". 33, 34.

† Hed. ii. i. "Section". 31. For definition of "am walid," *vide supra*, 171, note.

‡ Hed. ii. i. "Section". 26–28. As to edit of divorce, *vide* Hed. iv. xii.

will nevertheless be entitled to dower. And it is laid down that, after a separation on account of an invalid marriage, the woman must perform her edit if there has been carnal connection, such edit to commence from the date of the separation, and not from that of the carnal connection. It may not be unimportant, in considering this subject, to observe that the words "separation" and "divorce" do not necessarily involve the pre-existence of a *valid* marriage.* If there be a child born, it is deemed, generally, to be the child of the man, as if born in a valid marriage, the only peculiarity being, that, in applying the rules as to length of pregnancy, regard must be had to the time of the first sexual intercourse, not to that of the invalid marriage.†

MARRIAGES NOT PROHIBITED.—It may, as remarked above, be assumed generally that marriage is lawful when not expressly stated to be unlawful.‡ But the author of the Hedaya has thought it necessary to particularize a few special kinds in which, it may be presumed, he thought a doubt might otherwise arise, and it will be best to mention these before going farther.

Although, as above mentioned, a man may not be married to two sisters at the same time,§ he may marry

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* *Vide infra*, 330, 331.

† Hed. ii. i. "Section". 35; ii. iii. 25–28. As to edit of divorce, *vide* Hed. iv. xii.; as to rules respecting length of pregnancy, *vide supra*, 150.

‡ *Supra*, 293.

§ *Vide supra*, 296, 297.

a sister of his repudiated wife; but he must not do so until the expiration of the edit of the latter, whether the divorce be complete or reversible.*

A Mussulman may marry a kitabee woman, whether she be free or a slave. And he may marry a sabean woman who believes in the scriptures and professes faith in the prophets.†

A man or, woman may marry while a *mohrim;* in other words, may marry during the *ihram* of pilgrimage. And if a male mohrim contract in marriage a woman to whom he is guardian, such contract is valid.‡

It has been seen above that it is unlawful, under certain circumstances, for a free man to marry a female slave. Generally, however, he may do so, and that whether she be a Muslima (*i.e.* a Mussulman woman) or a kitabeea, and whether he be able to maintain a free woman and pay her dower or not; and, when already married to a slave, he may marry a free woman, though,

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* Hed. ii. i. "Section". 16. As to edit of divorce, *vide* Hed. iv. xii.

† Hed. ii. i. "Section". 18, 21. A kitabee is a common name for a Christian and a Jew, both being believers in the kitáb, or book; in other words, believers in the Old Testament, *vide* Hed., Prel. Discourse, xi.; and Wils. Gloss. The reader must not confuse this word with "kitabat," which is defined, *supra*, 170, note; the only connection between the words is their origin, both being derived from "kitáb," a book or writing. As to sabean, *vide supra*, 305, note.

‡ Hed. ii. i. "Section". 22. A *mohrim* is a pilgrim, while he remains at Mecca; the *ihram* of pilgrimage, the period during which he remains there; *ibid*, notes.

as seen above, he may not marry a female slave when already married to a free woman.* It is clear, also, that a free man may marry a mokatiba, a modabhira, or an am walid.†

Generally, according to Abu Hanifa and Muhammed, a man may marry a woman who is pregnant by whoredom, but he must not cohabit with her until after her delivery. According to Abu Yusuf, however, such a marriage is invalid; and it is invalid by general assent "if the descent of the fœtus be known and established."‡ If the woman be not pregnant, but only known to be guilty of whoredom, it would seem that there is no illegality in the marriage; but nevertheless, according to Muhammed (differing from the "two Elders") it is "laudable" that the husband should have no sexual intercourse with her until after her purification from her courses.§

If a man have sexual intercourse with his absolute slave, and afterwards contract her in marriage to another man, such contract is lawful,‖ but according to Muhammed (differing from Abu Hanifa and Abu Yusuf) it is

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* *Vide supra*, 305.

† Hed. iii. i. 23; ii. vi. 3. As to the question whether a man may contract his infant son to a female slave, *vide supra*, 303. For definitions of mokatib, modabhir, and am walid, *vide supra*, 170, 171, notes.

‡ Hed. ii. i. "Section". 29. *Conf.* marriage with pregnant female captive, *supra*, 305.

§ Hed. ii. i. "Section". 32.

‖ *Ibid.*

"laudable" for the husband to abstain from carnal connection with her until one complete term of her courses shall have elapsed.* If a man contract his am walid, not being pregnant by him, to another, such contract is valid, though it is otherwise, as seen above, if she be pregnant by him.†

If a man marry two women by one contract, one being a person whom it is lawful, and the other a person whom it is unlawful, for him to marry, the marriage with the former holds good, but the marriage with the other is void.‡

A dumb person may make a valid marriage, if he be capable of writing intelligibly, or of making intelligible signs.§

The youth of a female, even if she be a mere child, appears to be no bar to a valid marriage, for it is shown incidentally that a man may be lawfully married to a sucking child.‖

THE MARRIAGE CONTRACT.—Marriage is "effected and legally confirmed" by a contract, and a man may marry more than one woman by one and the same contract. A contract of marriage consists of a "declaration" or speech proceeding from one of the contracting

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* Hed. ii. i. "Section". 32.

† Hed. ii. i. "Section". 31. As to pregnant am walid, *vide supra*, 306. For definition of am walid, *supra*, 171, note.

‡ Hed. ii. i. "Section". 35. As to dower in such a case, *infra*, Chap. XVII.

§ Hed. liii. "Chapter the Last," 2.

‖ Hed. iii. i. 12.

parties, and a "consent," or speech in reply to the declaration, proceeding from the other. The declaration and the consent must not be in the present tense, but they may both be in the preterite, or one in the imperative and the other in the preterite.* The contract may be made by the use of the actual word *nikkah* (marriage); thus, the woman may say, "I have married myself to you for such a sum of money," and the man may reply, "I have consented." It is not necessary, however, that words literally expressive of marriage should be used, either of the words *tazweej* (contracting in marriage), *hibha* (gift), *tamleek* (consignment), *sadka* (alms gift), or *beeya* (sale), being sufficient. Thus, if the woman say, "I have contracted myself in marriage unto you," "I have bestowed myself on you," "I have consigned myself over to you," "I have given myself as an alms unto you," or "I have sold myself into your hands," it will be a sufficient declaration. But the use of any of the words *ijara* (hire), *ibahit* (permission), *ihlah* (rendering lawful), *areet* (loan), or *waseeyat* (bequest), is not sufficient, and a contract of marriage purported to be made with any of those words would be null and void; for the first four cannot operate as giving a right to the person, in other words a right to sexual intercourse, and the last is

* *i.e.* not in the present; for the present, being expressed, in Arabic, in the same form as the future, would be ambiguous.—Hed. ii. i. 1, note.

void, because it refers the execution of the contract to a period after the death of one of the parties, while a contract of marriage, even in express terms, is void if it refers to such period.*

A marriage contract, if lawful and valid in itself, is not rendered unlawful or invalid by a nugatory or unlawful condition being comprehended in it, *e.g.* an agreement to give wine or a hog as dower.† Thus, also, if a man make a lawful and a prohibited marriage by the same contract, the contract holds good as to the former, though it fails as to the latter, marriage.‡ On a similar principle, it seems clear that a marriage will not be invalidated by the breach of a lawful condition, *e.g.* that the husband will not take the wife away from her own city.§

An adult female, free and of sound mind, equally with a male, may enter into a marriage contract without the authority of any other person, and that whether she be a virgin or a siyeeba.‖ And, in a similar spirit, it is laid down that an adult virgin cannot be forced into marriage by her guardian without her own consent.¶

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* Hed. ii. i. 1.

† Hed. ii. iii. 23. *Secus* as to contracts generally, *vide* Hed. xxvi. iii. "Section" (second). 6.

‡ Hed. ii. i. "Section". 35. As to dower in such a case, *vide infra*, Chap. XVII.

§ Hed. ii. iii. 20. As to dower in such cases, *vide infra*, Chap. XVII.

‖ Hed. ii. ii. 1, 3. For definition of "siyeeba," *vide infra*, 317.

¶ Hed. ii. ii. 3.

The marriage contract of a male Mussulman with a female of the same religion is not lawful unless effected in the presence of two male, or one male and two female, witnesses.* Such witnesses must be free, adult, of sound mind, of mature age, and Mussulmans; but it is not necessary that they shall be "of established integrity," (for a *fasik*† is a competent witness,) nor that they should be persons who have never suffered punishment as slanderers. Blind persons and children of the parties are competent witnesses; and, in the case of a man desiring an agent to contract his infant daughter in marriage to a third person, and the latter doing so on the spot, in the presence of the father, the agent is a competent witness, so that only one other witness is required, for in such case the father is considered to be the contractor; but, if the father go away before the actual execution of the contract, the agent is the contractor, and cannot be a witness. Similarly, if a father matches (*i.e.* contracts) his adult daughter, at her desire, he may himself be a witness if she be present (for, in such case, it may be presumed, she will be con-

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* This is in conformity with the general law of evidence, *vide* Hed. xxi. i. 3; and it will be well to remember that, although there may be two females instead of one of the males, there may not be four females instead of the two males, *ibid.*

† We have not found any definition of this word in the Hedaya itself. Mr. Hamilton translates it "unjust person," but suggests that it has rather the meaning of a person who "neglects decorum in his behaviour and dress, and such other inferior points."—*Vide* Hed. ii. i. 4, note; xxi. i. 9, note.

sidered the actual contractor), but if she be absent he will not.*

If a Mussulman marry a female infidel subject, according to Abu Hanifa and Abu Yusuf (differing from Muhammed) the evidence of two male infidel subjects is sufficient.†

Evidence is an essential condition to marriage, the Prophet having said, "No marriage is good without evidence"; and, consequently, an opinion which was put forward by Malik, that notoriety, without positive evidence, is sufficient, is erroneous,‡ according to the doctrine of the Hanifites.§

The question, how far a decree of the Kazee made upon evidence adduced by a woman in support of an allegation of marriage with a particular man can give such woman the status and rights of a wife, and thus supply the place of a contract, when no contract has actually been made, has been a subject of much dispute; and the authorities are so conflicting that it

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* Hed. ii. i. 2–4, 6. The qualifications of witnesses of a marriage must be carefully observed, as the rules are more liberal than with respect to witnesses in other matters. The evidence of a slave, however, is generally invalid, as he is not competent to act in any respect *sui juris*.

† Hed. ii. i. 5. As to what are "infidel subjects," or zimmees, *vide supra*, 222, note.

‡ Hed. ii. i. 2. But as to the modern views on presumption of marriage, *vide infra*, 341, 342.

§ It will be remembered that Malik was the founder of another sect, *vide supra*, Preface.

would be of little use to record the several opinions here. The reader who is curious on this subject is referred to the Hedaya.*

CONTRACT BY GUARDIAN: ADULT FEMALE.—Although, as above-mentioned, an adult virgin cannot be forced into marriage by her guardian without her own consent,† yet it would seem that it is very common for the contract to be made through the medium of the guardian. The following rules have accordingly been laid down in order to determine what is, in such cases, a sufficient consent.

When the father, or a brother, or uncle, of an adult virgin, being her guardian, and "being the person empowered to engage in the contract," requires the consent of the virgin either by his own mouth or by a messenger, if she smile, laugh, or merely remain silent, it may be taken as a consent, and weeping may be taken as a refusal, for her modesty may naturally prevent her from speaking. But it is justly remarked that laughing may be a token of jest or derision, and that weeping, unless accompanied with noise and lamentation, may not be a sign of disapproval. It seems clear, therefore, that the significance of such tokens must depend on the general conduct and demeanour which accompanies

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* *Vide* Hed. ii. i. "Section". 36.

† Hed. ii. ii. 3, and *vide supra*, 312. This would seem to be true also of a siyeeba, or woman who is not a virgin, since rules for her consent are given a little later, *vide infra*, 317. It would seem, however, not to apply to a lunatic woman, *vide infra*, 318.

them. If the consent be asked by a person who is not her guardian, or by a *walee bayeed* (or guardian more distantly related than her father, brother, or uncle), a spoken consent is necessary; for here the silence may arise from shyness in the presence of such a person, and not from her feeling of modesty in consenting to the match. But it must be understood that if such other person be merely acting as the messenger of a nearly related guardian (*i.e.* father, &c.), the same rules hold as if the father, &c., himself required the consent.*

If the guardian of an adult virgin, being, as such, the person empowered to contract her in marriage, contract her to another man without her knowledge, the same rules as to consent apply as in the case above-mentioned of her consent being asked by a father, &c.; but if a person who is not her guardian so contract her, the consent must be actually spoken.†

In all the above cases, "the proposed husband must be particularly named and described, so as to enable her to form some idea of him, whereby to ascertain her liking or dislike; but it is unnecessary to name or specify the dower," for dower is not essential, and marriage may even be effected without any dower at all. If the person who conveys the intelligence‡ to her is neither

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* Hed. ii. ii. 4.

† *Ibid.*

‡ This is the actual word. It means, presumably, the "declaration" of the proposed husband, which may reasonably be described as "the intelligence" of his being willing to marry.

an agent nor guardian, nor a messenger from the guardian, such intelligence must be conveyed either by two persons, or, according to Abu Hanifa, by one person of good repute. If, however, the person who conveys such intelligence is a messenger from the guardian, there is no rule either as to number or as to integrity.*

For the above purposes, a woman is considered a virgin, notwithstanding that she may have lost the signs of virginity by leaping or any other exertion, or by a wound, or by frequent repetitions of the menses.

If a guardian propose a marriage to a siyeeba, *i.e.* "a woman with whom a man has had carnal connection," there can be no consent without her actually speaking, for she has not the same pretence to silence or shyness as a virgin.†

Notwithstanding the above definition of a siyeeba, it is maintained by Abu Hanifa that a woman is still to be considered a virgin, for the purpose of her silence being an acquiescence, even if the signs of virginity have been effaced by fornication, so long as she has not abandoned herself to fornication; for, if she have not so abandoned herself, she is still a virgin in the eyes of the world, and is therefore distinguishable from a woman who has lost her virginity by an "erroneous or invalid marriage." Abu Yusuf and Muhammed, however,

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* Hed. ii. ii. 4.

† Hed. ii. ii. 5. The words "with whom a man," &c. might perhaps be supposed to indicate the man with whom the marriage is proposed; but the context shows that *any* man is meant.

maintain the opposite view, and hold that every woman who has committed fornication is a siyeeba.*

If a dispute arise as to a woman having given her implied consent by silence, as if a man say to her, "You have heard of your being contracted to me by our friends, and remained silent," and the woman answer, "No, I refused you," or "I dissented," the woman's assertion "is to be believed," and she is to be considered defendant in a suit for establishing the marriage. If no evidence be produced by the plaintiff, according to Abu Hanifa (Abu Yusuf and Muhammed dissenting), she is not to be required to take an oath. But the fact of her silence may be established by evidence, and if such evidence be produced it would seem that it will prevail against her mere assertion.†

It seems that a lunatic woman, even though adult, may be contracted in marriage by her guardian without her own consent; for we are told that, if such a woman have two guardians, one her son and the other her father, the "authority of disposing of her in marriage," according to Abu Hanifa and Abu Yusuf (*dissentiente*

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* Hed. ii. ii. 6.

† Hed. ii. ii. 7. This dispute is only part of a wider question, Abu Hanifa maintaining, in opposition to Abu Yusuf and Muhammed, that a defendant is not to be required to take an oath (in other words, is not liable to have an immediate decree against him if he refuse to take an oath) in claims respecting marriage, reversal after divorce, rescindment in a case of aila, slavery, parentage, willa, punishment, or laan, *vide* Hed. xxiv. ii. 4, 7.

Muhammed), rests with the former and not with the latter.*

The Hedaya does not tell us fully what relations are entitled to the guardianship of an adult female; but it seems probable, from what can be gathered, that they are the same who would be entitled to be guardians of the same female if still an infant.†

CONTRACT BY GUARDIAN: INFANT.—An infant of either sex (and, if a female, whether a virgin or not) may be contracted in marriage by an older relation, commonly called a "guardian." The guardian of an infant is such infant's father, if living; if there be no father, the father's father‡; and, if there be neither father nor father's father, the person who, as the nearest paternal relation, would be entitled to succeed the infant under the law of inheritance, a nearer relation, as in the case of inheritance, being preferred to one more remote. In the absence of any paternal relations, maternal relations, according to Abu Hanifa (*dissentiente* Muham-

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* Hed. ii. ii. 21. The word "adult" is not used in the paragraph referred to, but it is of course clear that an adult is meant, for an infant could not have a son old enough to be her guardian. It seems clear that the "authority" requires no consent on the part of the lunatic, as such a person is considered in law to be incapable of acting for herself, and her consent would thus, evidently, be nugatory, *vide* Hed. ii. ii. 16.

† As to the persons entitled to be guardians of an infant, *vide* next paragraph.

‡ Probably the father's father h. h. s., as the word "grandfather" is used. The words "paternal kindred," which are also used, are of course exclusive of the mother's father, &c.

med; *dubitante* Abu Yusuf), may be guardians, provided they are within the prohibited degrees, and of the same tribe or family. If there are several persons related in the same degree and qualified to be guardians, *e.g.* several brothers, and no nearer relation, they will all be guardians, and any one of such guardians may contract an infant ward without the authority of the others.*

If the first natural guardian, in other words, the relation who would, primarily, be guardian, should be insane, or absent and at such a distance as is termed *gheebat-moonkatat*, the same person will be guardian who would be guardian if he were dead, and that person may contract the infant. If there be no natural guardian at all, the authority of contracting the infant is vested in the Imam or the Kazee; for the Prophet has said, "Persons being destitute of guardians have a guardian in the Sultan." †

If an infant female slave be manumitted, the mawla by manumission‡ stands in the position of a paternal relation of such infant, and, in respect of the right of contracting her in marriage, takes precedence of the maternal relations, though he comes after the actual

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* Hed. ii. ii. 8, 17; lii. vii. 11; and *vide* also lii. vii. 33.

† Hed. ii. ii. 19, 20. *Gheebat-moonkatat* is variously defined; some saying that it means "out of the track of the caravans"; others, "not visited by the caravan more than once in every year"; and others, "any distance amounting to three days' journey."

‡ *i.e.* the manumittor or his residuary heir, *vide supra*, 164.

paternal relations.* This is, *mutatis mutandis*, in analogy with the law of inheritance, for it will be remembered that the mawla of an enfranchised slave inherits, as "residuary for special cause," after residuaries by birth, but before D. K.†

A slave, an infant, or a lunatic, cannot have authority to contract an infant in marriage; and an infidel cannot have such authority with respect to a Mussulman infant, though he may have it with respect to an infidel infant.‡ It seems that these disabilities are absolute, the contracting parties being persons incapable of performing a legal act, and thus distinguishable from a fazoolee, or "unauthorized person," who is "sane and adult," and therefore not incompetent in himself.§

When infants are contracted by their fathers or grandfathers (which probably here means fathers' fathers), the marriage is absolutely binding, just as if it had been contracted by the parties themselves after arriving at the age of matur ity but if the contract be made by any other persons (even by the mother or the Kazee), its validity after maturity, according to Abu Hanifa and

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* Hed. ii. ii. 18.

† *Vide supra*, 163.

‡ *i.e.* a child of two infidel parents, for if one parent be a Mussulman, the child must be brought up as a Mussulman; and if one of two infidel parents be converted, and then have infant children, those children are considered Mussulmans.—*Vide* Hed. ii. v. 5, and *infra*, 337.

§ Hed. ii. ii. 16. As to contract by a fazoolee, *vide* Hed. ii. ii. "Section". 2; and *infra*, 326.

Muhammed (*dissentiente* Abu Yusuf) depends on the option of the infant, who has a right to decide whether the marriage shall be confirmed or annulled. The negative exercise of the option does not, however, of itself annul the marriage, but the marriage, in case of such exercise, must be dissolved by the decree of the Kazee.* A separation made in this manner is not a divorce, for it may with propriety proceed from the wife in like manner as from the husband, while a divorce may not.†

If a virgin thus contracted be silent when, after maturity, she first hears of the contract, her silence confirms the marriage, and her option is gone; but so long as she is not informed of the marriage her option continues. In the case of a siyeeba or a man, however, silence is not an exercise of the option, but it must be shown by the words "I approve," or "I disapprove," or by some action from which approval or disapproval may be inferred. Thus a man may exercise an approving option by presenting to the wife her dower, or by cohabiting with her, and a siyeeba may do so by admitting the husband to carnal connection, or the like. The option thus described is sometimes called the "option of maturity," ‡ as distinguished from "option of manumission," which will be further mentioned hereafter.§

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* Hed. ii. ii. 9, 10.

† Hed. ii. ii. 14.

‡ Hed. ii. ii. 11–13. For definition of "siyeeba," *vide supra*, 317.

§ *Vide infra*, 333.

In harmony with the above rules, it is laid down that the option of maturity of a virgin is not protracted to the end of the assembly, that is, the breaking up or dispersing of the company of persons who are present at the time of her attaining maturity; for if she neither assent nor dissent in words, her silence destroys the option; but the option of a siyeeba or a man, not being liable to destruction by silence, may continue to the end of the assembly and even beyond it.*

If a person properly contracted in marriage, as an infant, die before maturity, or die after maturity without a separation having taken place, the survivor is entitled to inherit as husband or wife, as the case may be; for the marriage is valid until dissolved, and the dissent which would cause its dissolution cannot now be expressed, so that the marriage, with all its mutual privileges, is irreversibly confirmed. On the other hand, if an unauthorized person purport to contract an infant in marriage, and either the infant or the other party die before assent be duly expressed, the survivor cannot inherit.†

RECIPROCAL CONTRACT BY GUARDIANS.—Reciprocal contracts of marriage by guardians are lawful. Thus, if a man contract his daughter or sister to another man, on the condition that the latter bestow a sister or

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* Hed. ii. ii. 13.

† Hed. ii. ii. 15. As to who are "unauthorized persons," *vide infra*, 326.

daughter in marriage upon the former, so that each contract is in return for the other, both contracts are lawful.*

GUARDIANS BOUND BY RULES OF EQUALITY.—Guardians are directed to observe the rules of equality in contracting a marriage, and they are said to have power to separate persons who have married in defiance of those rules. Some account of these rules will be found in an earlier part of this chapter.†

CONTRACT BY AGENT.—Marriage may be contracted by the medium of a person employed and authorized by either of the parties concerned to act on his or her behalf; the authority so given (*wikalit-ba-nikkah*) may be called agency in matrimony, and the person so authorized, an agent in matrimony.‡ An agent in matrimony may be either a man or a woman.§ It is quite clear that an agent may be empowered to find a wife, generally, without reference to any particular woman,‖ and it may be assumed that he may, in like manner, be empowered to find a husband generally. A person may be an agent and a principal at the same time, or may be an agent on both sides; and, in the latter case, there is no necessity for a separate declaration and acceptance,

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* Hed. ii. iii. 16.

† Hed. ii. ii. "Section" (first). 1, 2. For rules of equality, *vide supra*, 298.

‡ Hed. ii. ii. "Section" (second). 1, &c.

§ Hed. ii. ii. "Section" (second). 2.

‖ Hed. ii. ii. "Section" (second). 3.

for the words, "I have contracted" will comprehend both.* From the circumstance that it has been thought necessary to state that one agent can bind both parties, it may be assumed that a marriage can be contracted by two agents, one appointed by each party, and that such is the general course.†

The rules as to appointing an agent, as to an agent's authority, as to who may be an agent, and the like, are very carefully laid down by Moohummudan lawyers, and there is no distinction, it would appear, between the general principles relating to an agent in matrimony and those relating to any other agent. It would be beyond the scope of this work to enter at length into the subject of agency, and we must therefore refer the reader to the Hedaya.‡ It may be as well, however, to mention two practical rules of great importance; the first, that if two agents be appointed by the same person, and for the same purpose, one of them cannot, generally, act without the concurrence of the other; the second, that an agent cannot appoint another person to act for him, unless his constituent either give his express consent, or desire the primary agent to "act according to his wisdom and judgment."§

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* Hed. ii. ii. "Section" (second). 1. As to the meaning of "declaration" and acceptance, or "consent," *vide supra*, 310, 311.

† And this view is enforced by what is said, *infra*, 326, as to a contract by two fazoolees, or unauthorized persons.

‡ *Vide* Hed. xxiii.

§ Hed. xxiii. ii. "Section 4". 1, 5.

The negotiator of a marriage, if he is really an agent in matrimony, or actual contractor, cannot, generally, be one of the witnesses; but if the person whose marriage he has negotiated is an infant female, and her father is present, the father will be deemed to be the contractor, and the negotiator may be a witness.*

There are no special regulations as to the manner in which an agent in matrimony is to effect the contract, and it may be presumed, therefore, that the general provisions of the law of marriage, as laid down with respect to a marriage effected by the principals themselves, are generally applicable to a marriage effected by an agent.

The following, however, are one or two rules laid down as to special cases that may arise.

If a fazoolee, or "unauthorized person," in other words, a person purporting to be an agent in matrimony but not duly authorized, purport to contract a man or woman in marriage to another person, in the presence of two witnesses,† although the marriage is not valid *ab initio*, yet it will become so by the subsequent consent of such man or woman. And the same will be the result if the contract be made by two fazoolees, one for each party. But according to Abu Hanifa and Muhammed (*dissentiente* Abu Yusuf), one and the same person cannot

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* Hed. ii. i. 6.

† It will be remembered that two male witnesses (or one male and two females) are necessary to the validity of a marriage contract, *vide supra*, 313.

act in a contract of marriage either as a fazoolee on behalf of both parties, or as a fazoolee on the part of one party while he himself is the other party. Consequently, if an unauthorized person were to purport to contract two absent persons before witnesses, the contract could never become valid. And, if an unauthorized man or woman say before two persons (*i.e.* witnesses) "Be ye witness that I have married A.," A. being an absent woman or man, the contract will be absolutely void, and no subsequent consent of A. will ever make it valid.* Under any circumstances, if a man or woman contracted by a person not duly authorized by him or her should die without assenting to the marriage, it is clear that the marriage is absolutely void, and that the surviving contractee cannot inherit as a wife or husband.†

In harmony with the above rules, it is laid down that, if a man contract a slave without the consent of the owner of such slave, the contract is lawful or void according as the owner may afterwards approve or disapprove.‡

If an agent in matrimony, commissioned simply to procure "a wife," purport to marry his principal to two women by one and the same declaration, both marriages are unlawful, for both cannot be valid, the agent having authority to contract one only; and there is nothing to

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* Hed. ii. ii. "Section" (second). 2.
† Hed. ii. ii. 15.
‡ Hed. ii. ii. "Section" (second). 2.

show which is to have priority. A separation must therefore ensue in both cases.* But it may be clearly inferred, from the reasons given, that if one contract be made before the other, the latter contract will be void, and the earlier only be valid.

If an agent, commissioned generally as above mentioned, purport to contract his principal to the female slave of a third person,† the contract is valid according to Abu Hanifa; but Abu Yusuf and Muhammed consider that it is illegal. The reasons on either side seem, in this instance, to have about equal weight; Abu Hanifa contending that a general commission must be deemed to leave the matter entirely in the hands of the agent, while the two disciples argue that it must be presumed, in the absence of any expression to the contrary, that the constituent desired to marry, as is customary, a woman who was his equal.‡

If two men be uncle and nephew, it is lawful for the latter to contract the daughter of the former in marriage to himself.§ It is not easy, at first sight, to see the meaning of this rule as connected with agency; but the following considerations will perhaps explain it. It must be assumed, first, that the uncle is dead, for

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* Hed. ii. ii. "Section" (second). 3.

† It will be remembered that a man may not marry his own female slave, but may marry the female slave of another, *vide supra*, 304, 308.

‡ Hed. ii. ii. "Second" (second). 3.

§ Hed. ii. ii. "Section" (second). 1. No doubt pat. uncle is meant.

otherwise, as his daughter's guardian, he would himself, naturally, perform the contract, and an agent would not be required. If, now, the nephew were not related to the lady, he could, of course, by her own authority, marry her to himself, under the general rule that a man may be agent and principal in matrimony at the same time.* On the other hand, if he were her relation and guardian without being her agent, he could contract her to a third person, subject to certain conditions which have been mentioned earlier.† The significance of this special rule would seem, then, to be this; that being her father's nephew, and (it may be assumed that this is meant) her nearest paternal male relation and guardian, he may act in the several capacities of guardian, agent, and principal at the same time.

MARRIAGE OF SLAVES.—There are certain special rules relating to the matrimonial rights of slaves, as affected by the owner's authority and right of property. Such of these as properly come in this place we next proceed to mention. Such of them, however, as relate to dower will be found in the chapter on that subject‡; and such as come properly within the general categories of prohibited and non-prohibited marriages have been mentioned earlier in this chapter in treating of those subjects, and will not, generally, be dealt with again in this place.§

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* *Vide supra*, 324.

† *Vide supra*, 315, &c.

‡ *Vide infra*, Chap. XVII.

§ *Vide supra*, 297, 301, 303, 304–306, 308, 309.

No person of either sex in servitude, whether an absolute slave, a mokatib, a modabbir, or an am walid, may be married without his or her owner's consent. And, by analogy, a mokatib, though, by his contract of kitabat, he is able to acquire property, may not contract his own male slave in marriage without the consent of his owner. But a mokatib or mokatiba (female mokatib) may contract his or her own female slave without any consent from such owner, because dower, which is an acquisition, arises from such contract.* It would seem, however, to follow from this reasoning that a mokatib or mokatiba may not make such a contract without any dower, or on inadequate dower.

It has been seen above that a marriage between a man or woman and his or her own slave is unlawful.†

If a male slave marry without the owner's consent, the subsequent assent of the latter will, it is clear, cure the normal invalidity of the marriage, whether the contract be made personally or by an agent. Such an assent will be implied if he say to the slave, "Repudiate her by a reversible divorce," for such a divorce cannot be supposed except where there is a marriage already executed; but if he say, "Divorce her," or "Put her away," no assent is implied, for the terms "divorce" and "separation" are applicable to the obstructing or resisting

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* Hed. ii. iv. 1–3. As to the meanings of "mokatib," "modabbir," and "am walid," *vide supra*, 170, 171, notes. As to subject of dower, generally, *vide infra*, Chap. XVII.

† Hed. ii. iv. 4. *Vide supra*, 304.

execution of the contract, as well as to the dissolution of a contract already executed.*

It is the clear opinion of the author of the Hedaya (though it appears formerly to have been a subject of some controversy) that a person may contract his own absolute slave (whether male or female) in marriage with a third person, without any consent on the part of the slave. But he has not this power with respect to his mokatib or mokatiba.† We do not find it stated how the law stands in this respect as to a modabhir or modabhira, but it would seem, on principle, that the doctrine should be the same as with respect to a mokatib. A man may, however, contract his own am walid in marriage (unless she be pregnant) apparently without her consent.‡ When a female slave is once legally married (and it may be presumed, on principle, that this holds also with respect to a male slave), the purchase of the slave by another person does not annul the marriage.§

A man may contract his mazoon in marriage with any woman, even though he (the mazoon) be a debtor; and in such case the wife, becoming a creditor of the mazoon in respect of her dower, is entitled, generally,

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* Hed. ii. ii. "Section" (second). 2; ii. iv. 6.

† Hed. ii. iv. 10. As to what are mokatibs, modabhirs, and am walids, *vide supra*, 170, 171, notes.

‡ Hed. ii. v. 11.

§ Hed. v. vii. 1. As to pregnant am walid, *vide supra*, 306.

to share with the other creditors the price of the mazoon when sold for payment of his debts.*

If the owner of a female slave contract her in marriage, he is not obliged to send her to the house of her husband, for his right to her services still exists; but he must allow the husband to visit the wife at opportune seasons. If he permit the wife to live in the house of the husband, the husband is bound to give her subsistence and lodging, but, if he do not permit it, the husband is under no obligation in this respect, for subsistence is a recompense for the matrimonial restraint, and such restraint, on the latter supposition, does not exist. The permission to live in the house of the husband does not destroy the owner's right of property and usufruct in the slave, and he may therefore call for and require her legal service at any subsequent period.†

If a female slave marry with her owner's consent, and afterwards become free, she is at liberty to break off the marriage or continue it, whether her husband be a freeman or a slave; and, if she break it off, it is dissolved *ipso facto*, without any decree. A mokatiba has

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* Hed. ii. iv. 8. See further particulars, *infra*, 371. A mazoon ("privileged" or "licensed" slave) is a slave who is permitted by his owner, either expressly or by implication, to do acts which, primarily, can only be done by a free person; *e.g.* to purchase and sell; in which case his purchases and sales are valid, notwithstanding that he continues to be a slave.—Hed. xxxvi. 1. A slave, primarily, is incapable of all independent acts, except divorce, and (to a certain extent) acknowledgment. *Vide* Hed. xxxv. i. 1, 7, 9.

† Hed. ii. iv. 9, 10.

a similar option, presumably with the same result. The option here described is sometimes called the "option of manumission." In the circumstance of its operating without a decree, it differs from the "option of maturity" mentioned earlier in this chapter,* and it differs from it also in these particulars, that the marriage cannot be annulled by mere silence, and that the right of option is protracted to the end of the assembly and is annulled by the rising of the assembly; but it is similar to the option of maturity in this, that a separation resulting from it is not a divorce.†

If a female slave, being adult, marry without her owner's consent, the marriage, as already mentioned, is primarily invalid‡; but, if she afterwards become free, the marriage is valid without her having any right of option; for she was competent to contract the marriage but for the bar arising from the owner's right, and that bar is now removed, so that the case is the same as if she had given herself in marriage after manumissson.§

If a man cohabit with the female slave of his son, and she produce a child, and he (the father) claim it, the slave is his am walid, and he is answerable to the son for her value, but not for her dower.‖ But if, on the

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* *Vide supra*, 322, &c.

† Hed. ii. ii. 10, 13, 14; ii. iv. 13.

‡ *Vide supra*, 330.

§ Hed. ii. iv. 14.

‖ Hed. ii. iv. 16. In the first case the son loses his chance of marrying the slave, and thus obtaining her dower; but in the

other hand, the son marry his female slave to the father, and she produce a child, the father is then answerable for her dower, and not for her value; her child is born free, and she is not an am walid. The reason of the freedom of the child is that if he were a slave his own brother would be his owner.*

If a free woman, being the wife of a slave, should say to the owner of such slave, "Emancipate him on my behalf for a thousand dirms," and the owner should act accordingly, the marriage is annulled, and the wife acquires the right of willa with respect to the husband. In other words, her request, as it is accompanied by a consideration, amounts to her acquiring the property in him, and then, herself, emancipating him, while the momentary right of property in him, which makes him her own slave, renders the marriage null and void.† Abu Hanifa and Muhammed are of opinion (*dissentiente* Abu Yusuf) that the marriage will not be affected if no consideration is mentioned, and that the right of willa will be in the original owner; and their view seems to be just, having regard to the general doctrine that seisin is necessary to a gift, as distinguished from a sale; so that, in this case, no seisin being transferred to

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second case, the marriage being made in a regular way, he can stipulate for dower as usual. For definition of am walid, *vide supra*, 171, note.

* Hed. ii. iv. 17.

† It will be remembered that a marriage between a woman and her own slave is illegal, *vide supra*, 304.

the wife, the property in the slave never vests in her.*

INFIDELS, ALIENS, CAPTIVES.—We come next to certain special rules laid down as to the marriage of infidels, in which traces will be seen of the general spirit of liberality and justice which is so often discernible in Moohummudan jurisprudence. It is true that there are also indications of a feeling of severity towards apostates, but such a feeling is by no means peculiar to Islam.

It may be taken as a primary rule that infidels, generally, may contract marriages among themselves in their own way and according to their own rules, without complying with the Moohummudan law either as to the form of contract or as to the rules concerning prohibited degrees.† An apostate, however, whether male or female, cannot legally contract marriage with any person whatever, whether such person be a believer or an infidel. A male Mussulman, as we have seen, may not marry a majoosee, a pagan, or a sabean who worships the stars and does not believe in any of the divine revelations, but he may marry a kitabeea, or a sabean who believes in the scriptures and professes faith in the prophets; and it seems probable that, re-

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* Hed. ii. iv. 18. As to question whether a free woman can marry a slave, *vide supra*, 301; as to meaning of "willa," *supra*, 164.

† This may be gathered from Hed. ii. v. 1, 2.

versing the sexes, the same rules of prohibition exist.* It does not seem clear, however, whether, by similar rules of analogy, a Mussulman woman may marry a kitabee or a male sabean who believes in the Scriptures, &c. There are, indeed, some circumstances which seem to favour the presumption that she may not marry any person other than a Mussulman. It is stated, as we have seen, that a Mussulman may marry a kitabeea, but we do not find any statement that a Mussulman woman may marry a kitabee. Again, it is stated that if the husband of a kitabeea becomes a Mussulman, the marriage continues, because it was legal *ab initio;* and here again there is nothing said as to the like case with the sexes reversed.† And, in two passages relating to the conversion of one of an infidel couple, a still unconverted wife is alluded to as a "majooseea," while a still unconverted husband is designated by 'the general term "infidel." ‡ Lastly, in the rules of equality as to religion, an infidel male, generally, is assumed to be the inferior of a believing woman.§ On the other hand, there are passages, as seen immediately below, in which the possibility of a Mussulman woman being married to an infidel seems to be alluded to or clearly implied.‖ A

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* Hed. ii. i. "Section". 7–10; ii. v. 1, 4; and *vide supra*, 305, &c. For definitions of "majoosee," &c., *vide supra*, 305, note, &c.

† Hed. ii. v. 10; and *vide infra*, 338.

‡ Hed. ii. v. 7, 8.

§ Hed. ii. ii. "Section" (first). 4; and *vide supra*, 300.

‖ *Vide infra*, 337.

distinct statement of doctrine on this subject, if such a statement could be found, would be of much value.

Although, as seen above,* an infidel cannot be guardian to a Mussulman, he may be guardian to his own infidel children, and may contract them in marriage.†

If either the father or the mother of children be a Mussulman, the children must be brought up in the Mussulman faith; and if either one or the other of an infidel couple become a Mussulman, and they have infant children, those children will be deemed to be Mussulmans. Similarly, if one of a married couple be of a superior, and the other of an inferior, sect of infidels, the children will be deemed to be of the superior sect; *e.g.* if one parent be a kitabee and the other a majoosee, the children will be deemed to be kitabees.‡

If one of a married couple apostatize, a separation takes place; and, according to Abu Hanifa and Abu Yusuf, the marriage is annulled without any necessity for a decree of divorce, but according to Muhammed a decree can only be dispensed with when the husband is the apostate. If the wife be the apostate, she has no claim to alimony, unless there has been consummation.§ If the husband and wife apostatize together, and afterwards return to the faith together, the marriage is not

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* *Vide supra*, 321.

† Hed. ii. ii. 16; and *vide supra*, 321.

‡ Hed. ii. v. 5, 6. For definitions of "kitabee" and "majoosee," *vide supra*, 308, 305, notes.

§ Hed. ii. v. 14.

annulled*; and this statement logically involves the doctrine that if they apostatize together it is not annulled.

Generally, if an infidel couple, married according to their own laws, jointly embrace the faith, the marriage remains valid; thus, the marriage will remain valid, even though they were married without witnesses.† But if they are within the prohibited degrees (*e.g.* if a man have married his mother or daughter) the marriage is unlawful, and they must be separated. It is a disputed point between Abu Hanifa on the one hand, and Abu Yusuf and Muhammed on the other, whether, if the marriage was contracted during the woman's edit from a former infidel husband, it continues valid or not.‡

If the husband of a kitabeea, from being an infidel, be converted to Islam, the marriage, of course, continues valid, for it would have been valid if originally made between a Mussulman and a kitabeea.§ Generally, however, if one of an infidel couple be converted, and not the other, the conversion seems to lead to a separation; but there is a little uncertainty as to the exact working and limitation of this principle. If the parties be

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* Hed. ii. v. 15.

† It will be remembered that two male, or one male and two female, witnesses, are necessary to a Moohummudan marriage, *vide supra*, 313.

‡ Hed. ii. v. 1, 2. For enumeration of prohibited degrees, *vide supra*, 293, &c. For subject of "edit," *vide* Hed. iv. xii.

§ Hed. ii. v. 10. As to original marriage with a kitabeea, *vide supra*, 308.

within the prohibited degrees, it is generally admitted that there must be a separation if both parties apply to the magistrate for it; but Abu Hanifa maintains, in opposition to the "two doctors," that there will be no separation if only one applies. In ordinary cases, *i.e.* where they are not within the prohibited degrees, it is plain that the obstacle to lawful matrimony would be removed if the wife or husband who is still an infidel were to consent to embrace the faith. Accordingly, if a woman becomes a convert to the faith, and her husband is an infidel, or if a man becomes a convert, and his wife is a majoosee,* the magistrate, if the parties reside in a Moohummudan country, must call on the husband or wife, as the case may be, to embrace the faith, and if this is done, the marriage will continue, but if not, the magistrate must separate them. According to Abu Hanifa and Muhammed, the separation is a divorce if it arise from the refusal of the husband, but not if it arise from that of the wife. In the opinion of Abu Yusuf, however, it is not a divorce in either case.† If, on the other hand, the parties reside at the time of the conversion, and continue to reside, in a foreign country,‡ the magistrate has, of

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* As to the possible significance of the employment of the general word "infidel" in one instance, and the word "majoosee" in the other, *vide supra*, 336.

† Hed. ii. v. 3, 7.

‡ It will be understood by the context that a non-Mussulman country is meant.

course, no authority, and therefore it is impracticable for him to ask the husband or wife to embrace the faith; consequently, after the lapse of three terms of the wife's courses, the wife becomes completely repudiated without any decree, and that whether the marriage has been consummated or not.* If the parties reside in a foreign country, but the converted party afterwards remove into the Mussulman territory, a separation takes place, and it seems probable that, as in the previous case, no action is necessary on the part of the magistrate, for the same reason evidently applies.†

When separation takes place in consequence of a husband's conversion, the wife, if an alien, is not, generally, subject to any observance of edit. According to Abu Hanifa, the rule is the same when the wife is converted and the husband is an alien; but Abu Yusuf and Muhammed adopt the oposite view.‡

If an infidel married woman§ come out of a foreign country into the Mussulman territory, and afterwards become either a zimmee or a convert to the faith, she may marry; and, according to Abu Hanifa, no edit is required, but Abu Yusuf and Muhammed consider that

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* Hed. ii. v. 8.

† Hed. ii. v. 11.

‡ Hed. ii. v. 9. As to the case of a woman coming into the Mussulman territory, *vide infra*, next paragraph, &c.

§ "A woman" in the Hedaya; but she must be an infidel, or she could not be converted; and she must be married, or there would be no necessity to raise the question as to edit.

she must observe an edit.* If she be pregnant, according to the better opinion, she may not marry till after delivery; but Abu Hanifa is of opinion that she may marry, though there must be no consummation till after delivery.†

If a married couple be brought, as captives, out of a foreign country, the marriage continues; but if either the husband or the wife be so brought without the other, separation takes place, and, if the wife be the person so brought, no edit is required. It is inferred from these rules that the circumstance of the parties residing apart in different countries is a cause of separation, while the circumstance of captivity, in itself, is not such a cause. And it is observed that the case of captivity differs from the ordinary case of a wife remaining in her own country while her husband resides as an alien under protection‡ in the Mussulman territory, which latter case is not a cause of separation, for the husband's ultimate intention is to return home, and there is therefore, virtually, no separation of abode.§

Before quitting the subject of marriage it may be as well to observe that the old Arabian works to which we have had access contain little precise information as to presumption of marriage or as to the general subject of parentage. These practical branches of law have been

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* Hed. ii. v. 12. For definition of "edit," *vide* Hed. iv. xii.

† Hed. ii. v. 13.

‡ As to the meaning of these words, *vide supra*, 222, note.

§ Hed. ii. v. 11, 12.

the subject both of remarks in modern treatises, and of decisions or comments in the courts. The general conclusions as to the first point would seem to be, that marriage and legitimacy may in some cases be presumed from general circumstances, without direct proof of a marriage having taken place, and that, where marriage is shown to exist, a child born of the wife will be presumed to be the child of the husband. Such questions appear, however, to depend rather upon the general principles of evidence than upon rules strictly belonging to the law of marriage. The author has, in his own forensic experience, known an English marriage, and consequent legitimacy, to be presumed by the English Court of Chancery, though no evidence of the actual fact of the marriage was forthcoming. In cases of this kind a court must be considered, it is submitted, not to decide anything as to the law of marriage, but rather to assume, in order to avoid the risk of causing great hardship and injustice, that the law of marriage has been complied with. As to the latter point, it seems clear, according to modern opinions, that an illegitimate child will inherit from its mother and her relations, but not (unless the defect be cured by the acknowledgment of the father) from its father and his relations, being, indeed, considered to have no male parent.* And this

* *Vide* Tag. Lect. 1873, 120–126; where much of the more recent information on these subjects is collected. As to the first-mentioned subject, *vide* also Bail. M. L. I., 28–35. As to acknowledgment, *vide supra*, 180, 181; and *vide* also Hed. xxv. iii. 9; xxv. iii. "Section". 1.

would appear to receive some corroboration from what has been said above as to a decree of bastardy in connection with the subject of imprecation.*

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* *Vide supra*, 188.

CHAPTER XVII.

Of Dower.

Dower, generally, 344.—Dower, Specified or Proper, 348.—Proper, in place of Specified, Dower, 352.—Disputes as to Amount of Specified Dower, 357.—Retirement, 358.—Dower, Prompt or Deferred, 361.—Post-nuptial Dower, 363.—Remission of Dower, 364.—Effect of Invalid Marriage, 367.—Posthumous Claims of Dower, 369.—Dower on Marriage of Slaves, 370.—Infidels, Aliens, Apostates, 372.

Dower, generally.—A wife's claim to *mihr*, or dower, as this word is usually rendered by English writers, takes precedence of all claims by inheritance; and it is therefore important to state in what dower consists, and to consider the rules which relate to its amount, and to the time and manner in which it accrues.

Dower, in its general sense, is a sum of money, or other property, payable by a man to a woman on or after her marriage with him,* as a consideration for her person, in other words, for her consenting to allow him to have sexual intercourse with her. The husband, on his side, is entitled to the enjoyment of that for which he has bargained; and, consequently, if the woman apostatize before consummation of the marriage, so as to render the marriage unlawful,† she is not entitled to any dower whatever. If however, she die a natural death without consummation, the dower must be paid; probably because that is an event which is unavoidable. It is also laid down, however, that it must be paid if she commit suicide, the reason given for this apparently unjust rule being that, in worldly institutes (human law?), no regard is paid to an offence committed by a person against himself, so that suicide is held to be the same as dying a natural death.‡

Dower is shown, by numerous allusions and illustrations, to be a debt; and, being, in most instances, at least, a debt of health, it takes effect, generally, *pari passu* with the debts of ordinary creditors. Conse-

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* There may, however, be dower by a stipulation made after the completion of the marriage contract; and this, which we may call post-nuptial dower, will be mentioned *infra*, 363.

† As to apostates, *vide supra*, 337, &c.; and *vide infra*, 374.

‡ Hed. ii. iii. *passim*; ii. iv. 11, 12. It will be seen hereafter that, if a woman is dead, her dower goes to her relations according to the law of inheritance, *vide infra*, 346.

quently, it descends to the inheritors of the wife, and they may claim it from the husband, or from his estate after his death, though in one particular case, according to Abu Hanifa, they have no claim.* It follows that, if the amount of the dower is sufficient to exhaust the whole property of the husband, neither his legatees nor his inheritors will get anything.

It seems clear that, when a woman has once obtained seisin of her dower, her husband's right in that of which it consists is entirely gone, and the wife has an absolute and unrestricted power of disposition over it; for we find that she may sell it to the husband himself for a consideration.†

A woman's guardian may become surety for her dower, whether she be adult or an infant; and in such case she may claim the dower either from the guardian or from the husband, and if she obtain it from the former, he may recover it from the latter. In the case of an infant, the father may take possession of the dower; but he has this right as parent, not as guardian, and therefore he may not act thus in the case of his adult daughter.‡

It sometimes happens that disputes arise, whether articles sent by the husband to the wife are intended

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* Hed. ii. iii. 30; ii. iii. 38; ii. iv. 4; ii. iv. 8; xxv. iii. 1; &c. As to the exception alleged by Abu Hanifa, *vide infra*, 369.

† Hed. ii. iii. 30.

‡ Hed. ii. iii. 19.

as presents, or are to be taken as part payment of the dower. Such matters must be decided by evidence; but in the case of victuals dressed for eating, the wife's testimony is superior to the husband's, as such things are usually given as presents; while in the case of wheat, barley, and, indeed, generally, the husband's evidence is best. It has been observed, however, and the observation seems just, that articles usually supplied by a husband to a wife, as shifts, robes, and veils, are not to be considered part of the dower, "apparent circumstances arguing against this."*

If a claim of dower be brought against a husband, whether the wife claim an entire dower or only a half dower (as being due by reason of divorce without consummation†), an oath must be tendered to him, and, if he refuse to take it, a decree will be made against him; but the marriage will not thereby be established, for that might affect the interests of other persons.‡

If a father or grandfather (which here, probably, means father's father), when exercising his right to contract his infant child (or grandchild, as the case may be) in marriage, agree to a specified dower, which is inadequate (in the case of a female) or extravagant (in the case of a male), the agreement will nevertheless be valid.§

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* Hed. ii. iii. 40.

† *Vide infra*, 348.

‡ Hed. xxiv. ii. 9. As to disputes respecting the amount, &c., *vide infra*, 357, &c.

§ Hed. ii. ii. "Section" (first). 10. As to the rights of fathers, &c., generally, in respect of contracting infant children, *vide supra*, 319, &c.

Dower, as regards the manner in which the right to it arises, is of two kinds, specified, *i.e.* of stipulated amount; and proper or proportionable (*misl*), *i.e.* that to which the wife would be entitled even without any stipulation. As regards the time of payment, it is, again, of two kinds, *moajil*, or prompt, *i.e.* that which the husband agrees to pay immediately on the marriage; and *mowjil*, or deferred, *i.e.* that which he agrees to pay at a future season; but, with respect to the latter distinction, it must be borne in mind that dower may be either wholly prompt, wholly deferred, or partly prompt and partly deferred, according to the agreement between the parties.*

Dower, Specified or Proper. — Marriage may be made on a specified dower, or without mention of dower, or on a condition that there shall be no dower. When the dower is specified, the wife will be entitled to the stipulated amount, unless she be divorced before consummation, in which case she will only be entitled to half that amount. But when there is either no mention of dower or a condition that there shall be no dower, the wife is entitled, generally, to proper dower, for she has no power to divest herself of her right to dower†; if, however, the husband divorce her without consummation, she is only entitled to receive a *matat*, or present,

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* Hed. ii. ii. "Section" (first). 7; ii. iii. 2, 3, 6; ii. iii. 32; xxiv. iii. 12. See further as to prompt and deferred dower, *infra*, 361, &c.

† Hed. ii. iii. 1, 6.

consisting of a shift, a veil, and an outer garment, suitable to her condition, but worth not less than five dirms and not more than half her proper dower in all.* The amount of a *matat*, as being *misl*, or proper, *i.e.* suitable to the condition of the woman, may, it would seem, be the subject of a judicial decree.†

It has been seen that dower may consist of money or other property, and there is no reason to suppose that a specified dower is limited to any particular kind of property which it is lawful for a Mussulman to possess. But it cannot consist of anything which is not property, *e.g.* an undertaking to teach the Koran,‡ nor of property unlawful to a Mussulman, *e.g.* a hog or a cask of wine§; and it cannot consist of a right of water, probably because such a right, though it may be reserved, inherited, or bequeathed, is not strictly property, but only the subject of a claim.‖

Although, as above mentioned, a stipulation that there shall be no dower is ineffectual, and leaves unim-

* Hed. ii. iii. 7. In a later passage of the Hedaya it is stated that, when there is a specified dower, and the wife is divorced before consummation, there must be a *matat*; but this is, apparently, an error, as shown by the reasoning employed in the same paragraph. *Vide* Hed. ii. iii. 15. It is elsewhere laid down that, under such circumstances, the wife is entitled to one-half of the specified dower. *Vide supra*, 348.

† Hed. ii. iii. 36.

‡ Hed. ii. iii. 17.

§ Hed. ii. iii. 23.

‖ Hed. xlv. "Section 3". 1, 13.

paired the normal right to proper dower, yet a stipulation for a specified dower less in amount than the proper dower is valid, and will generally be carried out. But the sum must not be less than ten dirms, and if a smaller sum be specified, ten dirms will be due.* Similarly, if an article (*e.g.* a piece of cloth) worth less than ten dirms be specified, the wife will take such article, and, in addition, so much money as, together with its value, will make ten dirms.†

If a man specifies a particular object as dower, as, for instance, a particular slave, and the delivery becomes impossible from circumstances which happen afterwards and are beyond his control (*e.g.* the death of the slave before delivery), it would seem that the value of the article, or a similar article if it be of the kind denominated *zooatal imsal*, must be given.‡

Apart from the above rules, the amount of specified dower would seem to be entirely arbitrary, and to depend solely on the agreement between the parties. It seems clear that dower, if specified by a sick (dying) person, will be valid even if it extend to the whole of that person's

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* Hed. ii. iii. 2, 3. It is not clear, however, how these precepts can be carried out at the present day, for the amount of a dirm does not appear to be actually known. *Vide* Hed. ii. iii. 2, note.

† Hed. ii. iii. 24.

‡ *Ibid.* This is only given as a statement made, *arguendo*, by Abu Yusuf; but no dissent is expressed, so that it is, probably, received doctrine. *Zooatal imsal* are articles compensable (in cases of sale, or the like) by an equal quantity of the same species.—Hed ii. iii. 22.

property, as being a debt of health, because the cause of the debt is known. It is stated expressly that proper dower may extend to the whole, and this might, at first sight, seem to raise the inference that the doctrine does not apply to dower generally; but the reason for confining the statement to proper dower may well be that it it obvious in the case of specified dower, whereas in the case of proper dower, of which the amount is very uncertain, and may depend on the decision of the Kazee, it might be contended that the amount of the property of the sick person ought to be an element in the calculation.* It is laid down that if a sick person marry, being already in debt, the wife comes in as a joint creditor with the others, to the amount of her proper dower, which, from the context, may be taken to mean her proper dower, or her specified dower if not greater than her proper dower.†

The amount of proper dower depends upon a variety of considerations, the first of which is, that it must be such as is usually assigned to the wife's paternal relations, *e.g.* her sisters, C. sisters, paternal aunts, or paternal uncle's daughters. The dower of a maternal relation is not to be taken as a criterion, except if, and so far as, she may be a paternal relation too, *e.g.* if she be the

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* Hed. xxv. iii. 1. The translator states that specified dower is limited to one-third, like a dying gift; but this seems contrary to principle, and we do not find it stated in the Hedaya. For rules as to a sick (dying) person generally, *vide supra*, 280, &c.

† Hed. ii. iv. 8.

mother of the woman about to be married, and also the daughter of her father's paternal uncle; in other words, if the father and mother be paternal first cousins to one another. In regulating the proper dower according to that of paternal relatives, the bride must be compared in point of age, beauty, fortune, understanding, and virtue, with the woman whose dowers are to serve as a guide, and the amount to be fixed will vary according to these circumstances; and, in like manner, the amount may vary according to place of residence, or time (that is, times of trouble or confusion, as compared with times of tranquillity); and it has also been said that it will vary according as the bride may be a virgin or not, the state of virginity being, apparently, considered the preferable alternative. In case of dispute, the Kazee, it would seem, has authority to determine the just amount.*

PROPER, IN PLACE OF SPECIFIED, DOWER.—It may be taken as a general rule (notwithstanding some differences of opinion in particular cases which will be mentioned as they occur), that where there is ostensibly a specified dower, but, on account of illegality, invalidity, ambiguity, disputed amount, or other defect, the agreement cannot be carried out with certainty and propriety, the wife will have her proper dower, or some other equivalent, according to the justice of the case.

Thus, if the specified dower purport to consist of wine,

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* Hed. ii. iii. 29. As to the Kazee having authority, *vide* Hed. ii. iii. 39.

or a hog, the wife will have her proper dower, for these things are not property with Mussulmans, and therefore the condition relating to them is void.* And the result will be the same if it purport to consist of a right of water, for such a right, as seen above, is not a fit subject of specified dower.†

The result will be the same, according to Abu Hanifa, if a particular cask of vinegar be ostensibly given, and the supposed vinegar prove to be wine; but Abu Yusuf and Muhammed consider that the wife should have an equal quantity of vinegar of medium quality. And, if a person assign a specified man as dower, describing him as a slave, and he prove to be free, Abu Hanifa and Muhammed consider that there must be proper dower, but Abu Yusuf maintains that the wife must have the estimated value of the particular man supposing he were a slave.‡ If two men instead of one be specified, and one of the two prove to be free, Abu Hanifa is of opinion that the wife can get nothing more than the one slave remaining, provided that his value be not less than ten dirms; and that if the value be less, she will take the slave and so much money as will, together with his value, amount

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* Hed. ii. iii. 23; and *vide supra*, 312, 349. The marriage is not invalidated by the invalidity of the condition, for a contract of marriage, differing in this from a contract of sale, is not rendered void by a void condition being comprehended in it. *Ibid.*

† Hed. xlv. "Section 3". 13, and *vide supra*, 349.

‡ *Secus*, apparently, if the man be really a slave, and die before delivery, *vide supra*, 350.

to ten dirms.* Abu Yusuf maintains that the wife will take the slave, together with the estimated value of the other man if he were a slave. Muhammed considers that she will be entitled to the slave, together with sufficient property to complete her proper dower, if the slave be of less value than the amount of her proper dower.†

On the same principle, if a free man marry a woman on an agreement that he shall, by way of consideration, serve her for a stated time (*e.g.* a year), or teach her the Koran, she is entitled to her proper dower, according to Abu Hanifa and Abu Yusuf, for she cannot legally exact service from her husband, being a free man, and teaching the Koran is not property; but, on the other hand, if a slave, with his master's consent, marry on an agreement for service, it is valid, and the wife will be entitled to the value of such service and nothing more. Muhammed differs from Abu Hanifa and Abu Yusuf as to the first-mentioned case, maintaining that the wife will be entitled to a sum amounting to the estimated value of the husband's service for a year.‡

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* It will be remembered that a specified dower must not be less than ten dirms. *Vide supra*, 350.

† Hed. ii. iii. 24. This case offers a rare instance of three different opinions being espoused by Abu Hanifa, Abu Yusuf, and Muhammed, respectively. In such a case the opinion of Abu Hanifa would probably prevail; for, as the authority of Abu Hanifa is considered equal to the joint authority of the other two, it would probably be thought superior to that of either when taken singly.

‡ Hed. ii. iii. 17.

So, if two men make a reciprocal contract, *e.g.* that each shall marry the other's sister or daughter, one marriage being thus the consideration for the other, each wife must have her proper dower, the consideration not being of a kind which can properly constitute a specified dower.*

The case of a man making a lawful and a prohibited marriage by the same contract is mentioned later, under the sub-title "Effect of Invalid Marriage."†

In accordance with the same general principle, if a man agree to give, as dower, one of two slaves, *e.g.* if he should say, "Make one of these two the dower," and the slaves be of different value, according to Abu Hanifa ‡ the woman will be entitled to her proper dower if it be more than the value of one slave and less than that of the other; but if it be less than the value of the less valuable slave she will receive that slave, and if it be more than that of the more valuable slave, she will receive that one. Abu Yusuf and Muhammed, however, maintain that she will take the less valuable slave in all the cases. All are agreed that, if she be divorced without consummation, she will take half the value of the less valuable slave,

* Hed. ii. iii. 16.

† *Vide infra*, 368.

‡ "Abu Yusuf" in the text; but, as the other opinion is mentioned as that of the "two disciples" (Abu Yusuf and Muhammed), no doubt Abu Hanifa is meant.

but custom entitles her to a *matat* also, even though it should exceed such half value.*

Thus also, if the agreed dower be an animal, the kind being specified, but not the individual, *e.g* "a horse," or "an ass," the woman must receive an animal of the specified kind, and of a middling value, or, if the husband choose, the value instead. But if the agreement be made without mention of kind, *e.g.*, for "a quadruped," she must have her proper dower. The same result follows if the agreed dower be simply for a piece of cloth, without the kind of cloth being specified. But if it be for a piece of a particular kind of cloth, as, "a piece of hirrooey," and, *à fortiori*, if instead of merely saying a "piece," the husband mention the length, breadth, and quality, the woman will receive either the thing promised or the value, at the option of the husband. And if the agreement be for goods of which the quantity is ascertainable by weight or measure, the species being described, but not the quality, the result is the same; but if the quality be particularly described also, the wife must have the actual articles.†

A change from specified to proper dower may occur also when a marriage is made on a condition which is

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* Hed. ii. iii. 21. Towards the end of this paragraph the word "emancipation" occurs, evidently by mistake for "consummation." For definition of *matat*, *vide supra*, 348, 349.

† Hed. ii. iii. 22.

afterwards broken by the husband. Thus, if a particular sum* be specified, such sum being less than the wife's proper dower, the marriage being contracted on a condition that the husband is not take the wife out of her native city, that he is not to marry another woman while she continues to be his wife, that she is to be treated with reverence and not subjected to any laborious work, that she is to be presented with a rich dress, or the like, and the husband observe the condition, the woman will be entitled only to the specified dower; but if he break the condition, she will be entitled to her proper dower. If, on the other hand, a dower be specified in the alternative, *e.g.* 1,000 dirms if the husband shall not take her from her native city, and 2,000 if he shall do so, then, if he do not take her away she will have only 1,000; but if he take her away, according to Abu Yusuf and Muhammed she will have 2,000, but according to Abu Hanifa she will be entitled to her proper dower if it do not exceed 2,000 or fall short of 1,000.†

Disputes as to Amount of Specified Dower.—If a dower is admitted to have been specified, but the amount of such dower is disputed, *e.g.* if the husband assert that it is 1,000 dirms, and the wife that it is 2,000 dirms, the parties are at liberty to bring evidence

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* The actual words are "one thousand dirms."

† Hed. ii. iii. 20. It may perhaps be assumed that, if it exceed 2,000, she is to have 2,000, and if it fall short of 1,000 she is to have 1,000, but these points are not actually stated in the Hedaya.

aliundè, and if one bring evidence and the other fail to do so, the claim of the former is established. If both bring evidence (presumably of equal value *per se*), that brought by the wife is "to be preferred," as it "proves most"; and in such case the wife will be entitled to what she claims if her proper dower is less than that amount; from which it may, perhaps, be assumed that she will have her proper dower if it be equal to or greater than what she claims. If, however, neither bring evidence, both parties must be sworn, and this annuls the agreement as to dower, though it leaves the contract of marriage unimpaired. The amount of the woman's proper dower must then be judicially ascertained,* and the wife will have what she claims if the proper dower is equal to or greater than what she claims, the proper dower if it is less than what she claims but greater than what the husband acknowledges, but only what he acknowledges if the proper dower is equal to or less than what he acknowledges.†

RETIREMENT.—Retirement, under ordinary circumstances, is equivalent to actual consummation of the marriage; and it has an important bearing on questions of dower, in consequence of the following principles.

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* We take this to be the meaning of the words "a proportionable dower must be adjudged to the woman"; for it is clear from what follows that she actually takes her proper dower only in one of these sets of circumstances.

† Hed. xxiv. iii. 12.

Dower is considered to be earned* by consummation or retirement, or to be due on the husband's death, if he happen to die without consummation or retirement and without having divorced the wife; but if he divorce the wife without consummation or retirement, she is only entitled to half. In like manner, if a less dower than ten dirms be specified, she will be entitled to five dirms in case of divorce without consummation or retirement.† It consequently becomes important to consider what constitutes valid retirement.

Retirement, in the usual sense of complete retirement,‡ is the circumstance of a woman being alone with the husband at such a time and place that there is no bar to coition, so as to give him an opportunity of having sexual intercourse with her. By such retirement the wife is considered to perform her part of the contract, for it is the husband's own fault if he omit to have connection; and complete retirement is thus, as we have seen, equivalent to actual coition for the purpose of a right to dower.§ Retirement is incomplete, and therefore ineffectual, when there are circumstances which constitute a bar to coition; and this is the case when

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* *i.e.* the woman's title is complete; the dower is not necessarily payable at once. *Vide infra*, 361, &c., as to prompt and deferred dower, &c.

† Hed. ii. iii. 3–5, 11.

‡ In the Hedaya, and also in these pages, the word may be taken in this sense when there is nothing in the context to show that it is to include incomplete retirement.

§ *Vide supra*, 358.

one of the parties is sick, or fasting in the month of Ramzan, or is in the *ihram* of a pilgrimage, whether voluntary or obligatory, or of an *amrit* (visitation to the shrine of the Prophet), or when the woman is in her courses. Consequently, if the husband divorce the wife after such retirement only, she is entitled to only half her specified dower, being deemed to have been divorced before consummation. It may be noted that the fact of the husband being an *ineen*, or person naturally impotent, is not considered a bar to coition,* so that if a woman retire with such a person she will be entitled to her whole specified dower. And Abu Hanifa maintains that the law is the same with respect to a *majboob* eunuch, or man who has been made an eunuch by the amputation of the genital organ; but Abu Yusuf and Muhammed oppose this view and maintain that the wife only takes half. And it may also be mentioned that a *nifl* (voluntary) fast, a fast of atonement, or a fast in consequence of a vow, is no bar to complete retirement.†

It is important to remember that, in the case of an invalid marriage, retirement, even when complete, affords no presumption of coition.‡

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* Apparently because the woman has done her part, and ought not to be deprived of the consideration by a circumstance over which she has no control.

† Hed. ii. iii. 12–14; *vide* also Hed. iv. xi. 2.

‡ Hed. ii. iii. 25. See further as to invalid marriages, *infra*, 367, &c.

DOWER: PROMPT OR DEFERRED.—Prompt dower is payable immediately on the making of the contract, and the wife may refuse to admit the husband to sexual intercourse, or to go on a journey with him, while, on the other hand, the husband may not restrain his wife from going on a journey, or going abroad, or visiting her friends, until the whole of it is paid.* And even if, before such complete payment, she may have already admitted him to sexual intercourse, or have been in complete retirement with him,† she may still, according to Abu Hanifa, refuse to admit him or to go on a journey with him until it is all paid, though according to Abu Yusuf and Muhammed the right of refusal continues only if the woman is enjoyed by force, or if she is an infant or an idiot.‡ And, according to Abu Hanifa, she is entitled to subsistence, notwithstanding the latter kind of refusal, for she is not resisting, but maintaining, a right, while, on the other hand, Abu Yusuf and Muhammed maintain that she has lost her claim to subsistence by the delivery, involved in the sexual intercourse or retirement, of the object of the contract.§ It may be inferred from this statement of reasons, that all the three lawyers above mentioned admit her right of subsistence in case of original refusal. When the whole of the prompt dower has been paid, the husband has a right

* Hed. ii. iii. 31, 32.

† For definition of "retirement," *vide supra*, 359.

‡ Hed. ii. iii. 33.

§ Hed. ii. iii. 34.

to take the wife whithersoever he pleases, and he has, of course, a right to sexual intercourse.*

Deferred dower cannot, of course, be demanded at once, and it seems probable that it cannot be demanded, except, perhaps, in case of divorce, invalid marriage, or some other special circumstance, till after the death either of the wife or of the husband, for it is certain that it may form a subject of litigation between the wife or her inheritors and the husband or his inheritors,† and we find no trace in the Hedaya of any rule or custom as to its being payable at a fixed time or at any time during the joint lives.‡ Moreover, it is laid down (*dissentiente* Abu Yusuf alone) that a woman is not at liberty to refuse to admit her husband to sexual intercourse for nonpayment of deferred dower, which seems to give weight to the opinion that it is not generally payable (except, perhaps, in case of divorce) while both the husband and the wife are living.§ It seems, probable, how-

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* As to the first-mentioned point, Hed. ii. iii. 35. The words "whole of her dower" are used; but, taking the paragraph in connection with paragraphs 31–34, summarized immediately above, we may feel satisfied that prompt dower alone is meant. As to the second point, Hed. ii. iii. 31, 32.

† Hed. ii. iii. 37–39.

‡ It may be as well to mention, however, that Mr. Hamilton and Mr. Baillie seem to consider that it may be made payable at a given time, *e.g.* a year after the marriage. *Vide* Hed. ii. iii. 32, note; Bail. Dig. 128.

§ Hed. ii. iii. 32. A note to this paragraph describes deferred dower as payable "at some future time, as a year, or so forth," but

ever, that it is payable at once in case of divorce, for although we do not find any actual statement to that effect in the Hedaya, we have not been able to find anything to the contrary, and the passages which relate to claims of dower after the decease of one or both of the parties, by the mere use of the words "husband" and "wife," without any qualifying words, imply the existence of the matrimonial connection up to the date of the first decease.*

It must be borne in mind, however, that although the actual possession of deferred dower cannot be demanded immediately, the title thereto becomes complete on consummation or on the death of the husband without consummation.†

POST-NUPTIAL DOWER.—If no dower be specified at the marriage, but the parties, after the marriage, agree upon a specified dower, such agreement is binding. It may be convenient to designate a dower thus specified a post-nuptial dower. A post-nuptial dower appears to be exactly similar in its incidents to a dower specified at the marriage, except in one particular, namely, that as it is in lieu of the proper dower which was alone due in respect of the marriage contract, it will follow the same rule, so that in case of divorce before consummation (or,

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we have not been able to find any authority for this position, or anything indicatory of the existence of a custom of fixing a particular time for payment.

* Hed. ii. iii. 37–39.

† Hed. ii. iii. 4; and *vide supra*, 359, and note, *ibid.*

it must be presumed, retirement), the wife will not be entitled to half the dower, but only to a *matat*.* Abu Yusuf, however, maintains that this distinction does not exist, so that in his opinion there is no difference between a post-nuptial dower and a dower specified at the marriage.†

Again, if dower be specified at the marriage, and the husband make any post-nuptial addition to it, such addition is binding on him. If, however, there is a divorce without consummation (or, it must be presumed, retirement), according to Abu Hanifa and Muhammed the addition drops entirely, but according to Abu Yusuf the wife takes half of it, together with half the dower specified at the marriage.‡

REMISSION OF DOWER.—It has been mentioned that a woman cannot, by any antecedent act of her own, divest herself of the right to dower§; but a wife has the power, after the execution of the marriage contract, of remitting her dower either in part or entirely.‖

This power, which seems rather unfair towards the wife, since it leaves her exposed to the persuasions of her husband, has given rise to some rather curious distinc-

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* Hed. ii. iii. 8. As to *matat* in case of proper dower, *vide supra*, 348, 349.

† *Ibid.*

‡ Hed. ii. iii. 9. It will be remembered that, in case of such divorce, the wife takes half of a specified dower. *Vide supra*, 348.

§ *Vide supra*, 348.

‖ Hed. ii. iii. 10.

tions. If there be a specified dower of a particular sum of money,* or of certain articles of weight or measurement of capacity (*e.g.* iron or copper), and the wife make seisin of such dower, and give it to the husband, and he take possession of the gift,† and afterwards divorce her without consummation, he will be considered to have a claim upon the wife for one-half the amount; but if the wife make the gift without having obtained seisin, the other circumstances being the same, neither of them will have any claim upon the other. The reason of the first-mentioned conclusion is, that the husband is entitled to the return of half the dower which he has paid (the wife being entitled, it will be remembered, only to half the specified dower in case of divorce without consummation‡), and that the gift of certain money or articles which are not capable of identification with that to which he is so entitled is not such a return.§ The second conclusion, which is looked upon as forming a kind of exception to the principle of the first, is arrived at on the ground that the husband retains in his hands, by virtue of the gift, the very pro-

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* The actual words are, "of one thousand dirms."

† It will be remembered that seisin is necessary to the completion of a gift, *vide supra*, 232.

‡ *Vide supra*, 348.

§ To use a popular phrase of our courts, the money and articles are not "ear-marked" as forming the dower, so that the result is the same as if she had given other money and other articles.

perty which he would otherwise be able to recover after the divorce.*

Again, if, the other circumstances being as above mentioned, the wife make seisin of only half the dower,† *e.g.* 500 dirms out of 1,000, and then give to the husband either the whole or the half of which she has not made seisin, according to Abu Hanifa neither has any claim on the other, but according to Abu Yusuf and Muhammed the husband has a claim upon the wife for an amount equal to one-half of what she actually received, or one-quarter of the whole. If, on the other hand, she make a gift to the husband of less than half (*e.g.* 200 dirms out of 1,000), and take possession of the rest, according to Abu Hanifa the husband can claim from her such a sum as, with what she has given him, would make up the half (300 dirms, which, with the 200 would make up 500), but according to Abu Yusuf and Muhammed he can claim a full half of what she has received (400 dirms).‡

If, on the other hand, the dower consist of specified effects (*i.e.* neither of money nor of articles of weight or measurement of capacity), and the wife make a gift of

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* Hed. ii. iii. 18. There is clearly no objection for want of "ear-mark" in the latter case, for the property has never left the husband.

† The Hedaya gives merely the case of 1,000 and 500 dirms, but, as in the previous case, we have felt justified in putting the point in the abstract.

‡ *Ibid.*

it to the husband, and the husband afterwards divorce her without consummation, he will have no claim upon her, whether she have obtained seisin of the effects or not prior to making the gift. The reason of this rule is that the articles, differing from money and articles of weight and measurement of capacity, are capable of "identical specification." * The same rule exists as to an animal or effects which are "a debt upon the husband," *i.e.* borrowed by him from some other person.†

EFFECT OF INVALID MARRIAGE.—If a marriage is invalid, and the Kazee, on account of the invalidity, separate the married couple without consummation, there is, generally, no right to dower, even though there may have been retirement‡; but if the marriage has been consummated, the wife is entitled to her proper dower, unless there be a specified dower smaller than her proper dower, in which case she will take the latter. In any case she is not entitled to more than one dower, notwithstanding that there may have been repeated sexual intercourse.§

When, however, a man has married two sisters by two contracts, and it is not known which marriage took place first, ‖

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* Hed. ii. iii, 19.

† *Ibid.*

‡ It has been seen that, in such a case, retirement affords no presumption of coition, *vide supra*, 360.

§ Hed. ii. iii. 25, 26.

‖ It will be remembered that in such case both marriages are invalid, *vide supra*, 297.

in the opinion of the author of the Hedaya each is to have half a dower, though some are of opinion that they will take nothing if there is a dispute as to priority.* It must be presumed, in the absence of further explanation, that if the dowers are unequal, each is to have the half of her own.

If, on the other hand, a man make a lawful and a prohibited marriage by one and the same contract,† one dower being specified, according to Abu Hanifa the whole dower will go to the lawful wife, but according to Abu Yusuf and Muhammed the lawful wife will have her proper dower, and the other will take nothing, so that the remainder (if any) of the specified dower will lapse in favour of the husband.‡

If, however, a man marry an infant and an adult, and the latter gives milk to the former, so that both become prohibited to him,§ the adult is entitled to no dower unless there has been consummation, as the separation was

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* Hed. ii. i. "Section". 11.

† It will be remembered that in such case the lawful marriage holds good, while the other is invalid, *vide supra*, 310.

‡ Hed. ii. i. "Section". 35. The case of a man making two *lawful* marriages by one contract and on one dower, is not, we think, stated in the Hedaya; and it may be a question whether the wives will divide the specified dower equally, or in the ratio of their respective proper dowers. For the doctrine of the Fatáwa Alamgíri as to this point, *vide* Tag. Lect. 1873, 350.

§ It will be remembered that a man may not marry his wife's foster child or foster mother; *supra*, 295, &c.; consequently, if the two wives assume the relation of foster mother and foster child, both become unlawful.

caused by her own act, but the infant will be entitled to half her dower. It seems clear that the adult will be entitled to half her dower if there has been consummation before the prohibition arose.*

POSTHUMOUS CLAIMS OF DOWER.—It has been seen already that the right to dower is not extinguished by the death of husband or wife, or both†; and it is, in fact, distinctly laid down, that a claim of dower may be maintained by the wife against the husband's inheritors, by the wife's inheritors against the husband, or by the wife's inheritors against the husband's inheritors.‡ But it is maintained by Abu Hanifa that there is one exception to this rule, namely, that when both husband and wife are dead, the inheritors of the wife have, generally, no claim for proper dower, so that, unless there was a dower specified, they have, generally, no claim at all. But Abu Yusuf and Muhammed strongly oppose this illiberal doctrine, and it is not probable that it would prevail, for Abu Hanifa himself only founds it on the supposed difficulty of ascertaining what is the amount of the proper dower, by reason of the probable death of equals in age, &c., who, if living, could have given evidence on the subject, and admits that, if both husband and wife happen to die early, so that their equals in age are likely to be still living, the inheritors may demand the proper dower. The matter seems, therefore,

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* Hed. iii. i. 12. † *Vide supra*, 346.

‡ Hed. ii. iii. 37, 39.

to resolve itself purely into a question of fact, and there is no reason, it would seem, why the claim should not be tested by evidence in all cases.*

DOWER ON MARRIAGE OF SLAVES.—It is clear that when a man marries his female absolute slave to another person, the dower will belong to the owner, *i.e.* to the first-mentioned person; but it is otherwise with a mokatiba, who is entitled to receive her own dower. If in the former case the owner should, after the marriage, kill the female slave before consummation, according to Abu Hanifa no dower will be due, while, on the other hand, if the slave be killed by another person, or die a natural death, the dower will be payable in the usual manner. Abu Yusuf and Muhammed maintain that dower will be due in any case.†

If a male absolute slave marry by his owner's consent, the dower promised to his wife, being a debt, becomes obligatory on the owner by reason of his consent, and is a debt on the person of the slave, who may therefore be sold to pay it.‡ On the other hand, a mokatib or a modabhir (who cannot be sold, because, by reason of the contract or promise of freedom, the property in them is inalienable) must discharge the dower by his own

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* Hed. ii. iii. 38, 39.

† Hed. ii. iv. 11; ii. iv. 13.

‡ That is, it may be presumed, sold by the person entitled to the dower, for the owner might, of course, sell him under any circumstances.

acquisitions, and his person is not liable to be attached for payment.*

If a mokatib or mokatiba contract his or her own female slave in marriage, without any consent on the part of the owner of such mokatib or mokatiba, the dower is an acquisition of the seller, in like manner as anything else that he or she may acquire.†

If a person desire his slave to marry a female slave, and he do so by an invalid marriage, and have sexual intercourse, according to Abu Hanifa the slave must be sold for the discharge of the dower; but according to Abu Yusuf and Muhammed this is not so, but the slave may be required to pay the dower on becoming free at any subsequent time.‡

If a man contract his mazoon in marriage, the latter being a debtor, the wife, in respect of her proper dower, or of a specified dower if less than her proper dower, as the case may be, becomes a creditor equally with the other creditors; so that, if the slave is sold for the payment of his debts, the price realised must be divided between the wife and the other creditors in proportion to their respective claims; but any amount of specified dower above the proper dower must be postponed till the other creditors have been paid in full.§

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* Hed. ii. iv. 4, 5,

† Hed. ii. iv. 3.

‡ Hed. ii. iv. 7. It will be remembered that, in the case of an invalid marriage, there is no dower unless there is consummation. *Vide supra*, 367.

§ Hed. ii. iv. 8. For definition of "mazoon," *vide supra*, 332, note.

If a man marry a female slave, without her owner's consent, on a specified dower greater than her proper dower,* and her owner afterwards manumit her, (the marriage, it will be remembered, thereby becoming valid,†) the specified dower goes to the owner or the woman herself, according as the consummation precedes the manumission, or is subsequent to it.‡ It will be remembered that the dower of a female slave belongs, generally, to her owner,§ and it may perhaps be gathered from this, that, in the case here proposed, if no dower had been specified, the proper dower would have belonged to the owner, whether the consummation preceded the manumission or not.

The case of a man cohabiting with a female slave of his son, who thereby becomes his am walid, has been fully dealt with in an earlier chapter, and need not be described here.‖

INFIDELS; ALIENS; APOSTATES.—In case of the conversion to the faith of one of an infidel married couple, and the refusal of the other, when called upon by the magistrate, to embrace the faith also,¶ if the refusing party be the wife, she is entitled (as in the case of her

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* The actual words are, "on a dower of one thousand dirms, when her proper dower is only one hundred dirms."

† *Vide supra*, 333.

‡ Hed. ii. iv. 15.

§ *Vide supra*, 370.

‖ *Vide supra*, 333, 334.

¶ *Vide supra*, 339, 340.

apostasy*) to her whole dower if the marriage has been consummated, but to none if not. It may perhaps be presumed that she is entitled to the whole if the husband be the refusing party, for nothing is stated to the contrary, and her loss of the right in case of her own refusal is attributed to the circumstance that such refusal is her own act.†

If a zimmee marry a zimmeea, making the dower consist of wine or pork,‡ and one or both should afterwards embrace the faith before the wife has obtained seisin, according to Abu Hanifa the woman is entitled to receive the actual article, if it has been "identically specified," but if not, the estimated value of the wine, or her proper dower in lieu of the pork, as the case may be. Abu Yusuf maintains that she is to have her proper dower, and Muhammed the estimated value, in all cases.§

If a Christian zimmee‖ marry a Christian zimmeea, without specifying any dower, or on a specified dower consisting of carrion (flesh of an animal not lawfully slain¶), such as may be deemed lawful by members of

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* *Vide infra*, 374.

† Hed. ii. v. 7.

‡ As to such a dower in the case of a Mussulman husband, *vide supra*, 352, 353.

§ Hed. ii. iii. "Section". 2. In case of divorce before consummation, the usual rules are followed; *ibid*, and *vide supra*, 348, 349.

‖ For definition of "zimmee," *vide supra* 222, note.

¶ This explanation, from a note appended to the paragraph in the Hedaya, appears to have reference to the rule that animals for

their profession, and have sexual intercourse with her, or divorce her without consummation, or die without consummation,* according to Abu Hanifa she is not entitled to any dower, although both parties may have embraced the faith in the interim ; but according to Abu Yusuf and Muhammed she will take her proper dower if the husband consummate the marriage or die without consummation, and will be entitled to a present† if she be divorced without consummation. All the three lawyers above mentioned agree that the doctrine as to aliens married on similar terms in a foreign country is identical with that held by Abu Hanifa as to Christian zimmees and zimmeeas.‡

If a husband and wife be both of the Moohummudan faith, and the husband apostatize, the wife is entitled to her whole dower if the marriage has been consummated, and to half if not; but if the wife apostatize, she is entitled to the whole in the former case, but to none in the latter.§

The particulars given above as to the dower of infidels, aliens, and apostates, are necessarily very slight, the materials at hand being extremely scanty; but the rules

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food must be slain by *zabbuh, i.e.* a mode by which the "unclean blood" is separated from the "clean flesh." *Vide* Hed. xlii. 1.

* The words are, "die and leave her," but the context clearly shows that this is the meaning.

† As to meaning of a present (*matat*), *vide supra*, 348, 349.

‡ Hed. ii. iii. 'Section". 1.

§ Hed. ii. v. 14.

as to the marriage of such persons, which are a good deal more comprehensive, have sufficient bearing on the subject of dower to afford guidance, probably, in most cases that will actually occur.*

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* *Vide supra*, 335.

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